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# CORRIGENDUM.

GOTTLIFFE *v.* EDELSTON [1930] 2 K. B. at p. 382, lines 17 and 18. *Delete* " whether the wife be joined or not as a defendant."

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DETERMINED BY THE

# KING'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT OF CRIMINAL APPEAL

AND BY THE

# RAILWAY AND CANAL COMMISSION.

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## FOWLER *v.* COMMERCIAL TIMBER COMPANY, LIMITED.

C. A.
1930
*April* 30.

[1929. F. 548.]

*Company—Contract—Contract by Company to employ Managing Director for fixed Time—Voluntary Liquidation—Assent of Managing Director—Determination of Contract of Employment—Liability of Company.*

By a written agreement the plaintiff was appointed managing director of the defendant company for five years at a certain salary. Before the expiration of the five years a resolution, which was supported by the plaintiff, was duly passed for the voluntary winding up of the company as by reason of its liabilities it could not continue its business. In an action by the plaintiff claiming damages for breach of the agreement to employ him for five years:—

*Held*, that a term could not be implied in the agreement that if the company went into voluntary liquidation with the assent or approval of the plaintiff he should lose all right to recover damages for the breach of the agreement, and that he was entitled to damages for that breach.

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APPEAL from a decision of Acton J.

The plaintiff claimed damages for wrongful dismissal and/or repudiation of an agreement made between him and the defendant company, dated October 30, 1923. By that agreement, which recited that the plaintiff was to be entitled to subscribe for certain shares in the company and be appointed its managing director, the company appointed him managing director for five years and one quarter calculated from July 1, 1923, at a salary of 1500*l.* per annum. Clause 8 provided that: "If at any time Mr. Fowler shall cease to be a director or employee of the company, whether by reason of retirement, disqualified removal, dismissal, death or otherwise howsoever, the board of directors of the company may give to Mr. Fowler or his legal personal representatives notice requiring him or them to transfer all or any ordinary shares registered in his name and upon payment to him of the fair value thereof . . . . Mr. Fowler or his legal personal representatives shall be bound to sell and transfer such shares to such person or persons as the board of directors shall nominate." The plaintiff duly acted as managing director of the company till the beginning of 1928, when the financial position of the company was such that it had become apparent that it could no longer carry on business. Accordingly, on January 25, 1928, a resolution was passed for the calling of an extraordinary general meeting of the company on February 3 for the purpose of "considering and, if deemed expedient, passing as an extraordinary resolution the following resolution: 'That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily, and that the secretary do convene such meeting forthwith.'" The plaintiff, as one of the directors, voted for that resolution, and at the extraordinary general meeting of the shareholders held on February 3, the plaintiff being present, it was proposed, seconded and unanimously carried: "That it has been proved to the satisfaction of this meeting that

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the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily." On the same day the plaintiff was handed a letter signed by the joint liquidators who had been appointed at the meeting in these words: " Dear Sir, This is a formal notice to inform you that this company having gone into voluntary liquidation, we consider that your agreement with the company is now terminated, and, therefore, your services will not be required after this date." The plaintiff declined to accept this position, and on February 4 he went to the office of the company and formally tendered his services, but was told to go away as his services were no longer required, whereupon he left. Thereafter he commenced the present action.

By their defence the defendants said that the voluntary liquidation of the company was brought about by the plaintiff inasmuch as he voted for the resolution for that course being adopted; that they were prevented from performing their contract with the plaintiff by reason of the winding up brought about by the plaintiff as aforesaid; and therefore that he was not entitled to damages.

Acton J. in giving judgment said that the argument for the defendants was that a term must be implied in the agreement that if the company went into voluntary liquidation with the assent or approval of the plaintiff, the latter was ipso facto to lose all right to recover damages for what otherwise would have been a breach of the agreement. In his view that argument could not prevail, and the plaintiff was entitled to damages which he assessed at 303*l.* 14*s.* 8*d.*

The defendants appealed.

*R. A. Willes* (*Eales K.C.* with him) for the appellants. By s. 184 of the Companies (Consolidation) Act, 1908—now s. 228 of the Companies Act, 1929—in the case of a voluntary winding up, " the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial

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winding up thereof," and by s. 186, sub-s. (iii.), of the Act of 1908—now s. 232, sub-s. 2, of the Act of 1929—"on the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof." The parties in this case must be taken to have made their bargain with a knowledge of these sections. The plaintiff is therefore not entitled to claim damages, more especially as he not only consented to, but assisted in passing, the resolution by which the company went into voluntary liquidation, and thus terminated the possibility of a continuance of his contract: see per Kennedy L.J. in *Measures Bros., Ld.* v. *Measures.* (1)

[Greer L.J. If the plaintiff had acted otherwise than he did in connection with the resolution for voluntary liquidation he would have been acting in opposition to the real interests of the company.]

The plaintiff might have said that being an interested person he would not vote, or he might have said that he reserved his rights. He did neither.

[Scrutton L.J. What term do you suggest should be implied in the agreement?]

A term that if in the future the company should with the consent and assistance of the plaintiff go into voluntary liquidation, thereby determining his power to discharge the duties of managing director, he should no longer be entitled to anything under the agreement. The contract contemplates the termination of the plaintiff's agreement in certain events, and the additional term suggested should be implied, that being such a term as is necessary in a business sense to give efficacy to the contract: *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*). (2)

*Valentine Holmes* for the respondent was not called upon.

Scrutton L.J. Mr. Willes has said everything that could be said in support of the appeal, but I think Acton J. was clearly right in the conclusion at which he arrived.

(1) [1910] 2 Ch. 248, 258.

(2) [1918] 1 K. B. 592, 605.

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The plaintiff was appointed managing director of the defendant company under an agreement dated October 30, 1923, for five years and one quarter as from July 1, 1923, at a certain salary. The company was never very successful, and in 1928 it was in such a state that if it did not take proceedings for being voluntarily wound up, it was tolerably clear that it would be compulsorily wound up, and it was therefore in the interests of the shareholders and the company that it should not go on trading at a continuous loss. Accordingly the directors of the company, including the plaintiff, came to the conclusion that it was desirable that the company should be wound up voluntarily; and the plaintiff voted for that resolution. A general meeting was then called at which the shareholders took the same view, and the plaintiff, as a shareholder, voted for the resolution that the company should be voluntarily wound up. Next day the liquidators said to the plaintiff that his engagement as managing director had ceased and that he need not and must not any longer attend at the office. To that the plaintiff said, in effect, that he had a five years' agreement, that the company could not break it, and that what had occurred was a breach of the agreement which entitled him to damages. While there is in the agreement, probably unnecessarily, a term as to what is to happen if the plaintiff should die, it contained no term as to what should happen if the company ceased to exist by going into voluntary liquidation. But it is suggested that although there is no express term in the agreement dealing with that contingency, a term should be implied that if the company was wound up voluntarily it should be under no further liability to the plaintiff for the unexpired period of the five years' agreement. I do not repeat what I said in *Lazarus* v. *Cairn Line* (1), and in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (2), but, broadly speaking, you only imply a term in a contract if it is such an obvious term that if the parties had thought of it they must have agreed to it. In the present case I do not think a term can be implied in the agreement that if the

(1) (1912) 17 Com. Cas. 107.

(2) [1918] 1 K. B. 592.

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company should be voluntarily wound up the plaintiff's right to employment should cease, still less the much more complicated term that if the company should be wound up voluntarily and the plaintiff should vote for that course being adopted, the plaintiff's right to employment should cease. Such a complicated term cannot be implied for this reason: the two positions of the plaintiff (1.) as managing director, who claims damages for breach of the contract of employment, and (2.) as a director and shareholder of the company who thinks that in its own interests the company ought to stop business are quite consistent. A director and shareholder may think that the company ought not to continue carrying on business at a loss even if the consequence of that may be that it will have to pay damages for breach of the contract of employment. In my view the term suggested cannot be implied, and the appeal must be dismissed.

Greer L.J. I agree. There is no doubt that an order for the compulsory winding up of a company puts an end to the employment of the managing director whether his engagement is for an indefinite time or for a fixed term, and in my judgment the same result must necessarily follow where there is a resolution for the voluntary winding up of the company which depends upon the company being unable to meet its obligations; but it is not really necessary to determine that in this case because on the facts proved, if the resolution for winding up of itself did not put an end to the employment of the plaintiff, the conduct of the liquidator was quite sufficient to put an end to it and give the plaintiff a right to claim damages if the company, which is an entity quite distinct from the directors and shareholders, was not then entitled to put an end to the contract. We are asked to say that a term should be implied in the contract which would preclude the plaintiff from saying that the winding up order was a breach of contract of which he could complain. I see no ground for implying such a term as was suggested by Mr. Willes—namely, a term that if at any future time the company should, with the managing director's consent and assistance, go into voluntary liquidation during the currency of the contract of employment, the managing director should not be entitled to damages for breach of contract. Mr. Willes said that such a term should be implied because in the contract there are terms which contemplate that the managing director might be disqualified and that his employment might come to an end, but the presence of those express terms seems to me to afford no ground for implying a term which would deprive the managing director of his right to damages if he assented to the winding-up resolution, especially if his assent was of no consequence because the winding-up resolution would have been passed whether he assented to it or not.

SLESSER L.J. I agree. Mr. Willes does not suggest that if at any time the company should go into voluntary liquidation and thereby determine the power of the plaintiff to discharge his duties he should not be entitled to complain of the breach of his agreement except where the resolution for voluntary winding up was passed with his consent. That would necessarily involve, if such a term as Mr. Willes contends should be implied, that the plaintiff as director would be unable to give disinterested advice to the company on the question of going into voluntary liquidation without affecting his own position as managing director. Applying to this case what was said by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom)* (1) that a term is to be implied only if it is necessary in a business sense to give efficacy to the contract, it is clear, to my mind, that in a business sense, the director of a company should be free to act for the company in a manner which is necessarily implied from the fact of his being a director—namely, to bear in mind his fiduciary obligations to the shareholders. There is no express term in the contract on the subject and I can see no ground for introducing the implied term suggested by Mr. Willes.

*Appeal dismissed.*

Solicitors for appellants: *Andrew, Wood, Purves & Sutton.*

Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

J. S. H.

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(1) [1918] 1 K. B. 592, 605.

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*May* 1, 2, 5.

# H. S. WRIGHT & WEBB *v.* ANNANDALE.

[1929. W. 2949.]

*Husband and Wife—Divorce Suit by Husband—Wife's Costs in defending—"Necessaries"—Misconduct of Wife—Liability of Husband to Wife's Solicitors.*

The rule that a solicitor acting for a wife, who is living apart from her husband, cannot, in a common law action, recover his costs from the husband, if when those costs were incurred the wife, although the fact was unknown to the solicitor, had been guilty of a matrimonial offence, applies not only where the wife has been living in adultery but also where she has committed an isolated act of adultery. The rule applies alike whether in the particular matter the wife was proceeding against the husband, or was defending a suit brought against her by the husband.

Observations of Scrutton L.J. in *Durnford* v. *Baker* [1924] 2 K. B. 587, 600 considered.

APPEAL from a decision of Humphreys J. in an action tried with a jury.

The plaintiffs, who were solicitors, sued the defendant to recover 130*l.* 5*s.* 1*d.* as the balance of professional costs incurred on behalf of the defendant's wife in certain proceedings in the Divorce Court.

The defendant's wife consulted the plaintiffs, who believed her to be a thoroughly respectable woman, and instructed them to act on her behalf in proceedings against the defendant for judicial separation on the ground of his alleged cruelty. A petition for judicial separation was accordingly filed, and a little later the defendant filed a cross-petition for divorce, alleging acts of adultery by his wife with certain named persons before the plaintiffs began to act on her behalf. The wife then abandoned the petition for judicial separation, and withdrew the plaintiffs' retainer. Ultimately the defendant's cross-petition for divorce was not defended, and on January 30, 1930, the defendant was granted a decree nisi.

The plaintiffs under the procedure of the Divorce Court obtained payment of part of their costs from the defendant, and believing that after their retainer had been withdrawn they could not apply in the Divorce Court for payment of the balance of their costs, they sued the defendant in a common law action to recover them. The defendant denied liability, as he said the services in respect of which the costs were claimed were not necessaries inasmuch as his wife, who was living apart from him, had, he alleged, committed adultery. At the trial the jury, having found that the defendant's wife had committed adultery, returned a verdict for the defendant.

The plaintiffs appealed.

*Croom-Johnson K.C.*, *J. W. Morris* and *G. A. Thesiger* for the appellants contended that there had been misdirection, and that there was no evidence upon which the jury could find that the defendant's wife had committed adultery before she instructed the plaintiffs to act on her behalf.

Not only on the facts but on the law the plaintiffs are entitled to recover. The old cases show that a husband can only escape liability for necessaries supplied to his wife if at the time they were supplied the wife was living in adultery, that is, was continuously committing adultery: see *Cragg* v. *Bowman* (1); *Atkyns* v. *Pearce*. (2) This point was not taken in *Durnford* v. *Baker* (3), nor in *Arnold & Weaver* v. *Amari* (4), where two acts of adultery were alleged.

[Scrutton L.J. In Lush on Husband and Wife, 3rd ed., p. 394, it is said that "the wife's right to assume her husband's assent to her contracts for necessaries exists only where she continues chaste," and on p. 407 it is said that the wife's "absolute right to pledge his credit for necessaries ceases if she is guilty of unchastity, even though she has been turned away or deserted by her husband."]

Those statements go beyond the decided cases.

Secondly, the husband is liable to pay the costs incurred by the wife in defending herself against charges made against her by the husband. The reason for this was stated by Sir George Jessel M.R. in *Robertson* v. *Robertson* (5); see also

(1) (1704) 6 Mod. 147.
(2) (1857) 2 C. B. (N. S.) 763.
(3) [1924] 2 K. B. 587.
(4) [1928] 1 K. B. 584.
(5) (1881) 6 P. D. 119.

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*Holt* v. *Holt* (1); *Otway* v. *Otway*. (2) In *Durnford* v. *Baker* (3) Scrutton L.J. said there might be a distinction between cases where the wife is the attacking party and where she is the defending party, a view which is in line with the earlier decisions.

[Scrutton L.J. *Jinks* v. *Jinks* (4) appears to show that notwithstanding the withdrawal of the plaintiffs' retainer they could have applied in the Divorce Court for their costs.]

Here the plaintiffs had not obtained the registrar's certificate under r. 91 of the Matrimonial Causes Rules, 1924, entitling them to carry in their bill of costs for taxation against the husband.

*Cartwright Sharp* and *E. H. Blain* for the respondent were not called upon.

Scrutton L.J. [after holding that there was no misdirection and that there was evidence which entitled the jury to find that the wife had been guilty of adultery with one co-respondent and possibly with two co-respondents before the appellants were instructed by the wife to act on her behalf in her suit for judicial separation, and later, when she was on the defensive, continued:] The appellants say that their retainer having been withdrawn they were unable to make an application in the Divorce Court for security for their costs. In that I think they were wrong. *Jinks* v. *Jinks* (4) seems to me to show that although their retainer had been determined they could have obtained an order for security for their costs incurred up to that time. But putting that point aside, which does not affect the legal question we have to decide, Mr. Croom-Johnson advanced two arguments on their behalf. He said, first, that the common law rule that a solicitor acting for a wife cannot recover his costs from the husband if they were incurred where the wife had been guilty of a matrimonial offence, whether the solicitor knew it or not, applied only where the wife was living in adultery and was thus continuously committing adultery; and that it has no application where there has been an isolated act of adultery, as there may have been in this case. No authority for that proposition has been cited, and it appears to me to be quite contrary to the principles on which the common law rule rests. As I understand it, the rule is simply a particular instance of the general law of agency, which is that if an agent has been guilty of an act in breach of the contract of agency and which goes to the root of that contract, the agent can no longer make any claim upon the principal. An example of this is furnished by the case of a commercial agent who takes a bribe from the other party—an act which is so inconsistent with the whole relation of principal and agent that the agent forfeits all rights under the contract of agency and cannot recover from the principal any remuneration for that or any act connected with the contract. The common law rule that if the wife is unchaste she ceases to be the agent of necessity for her husband when she is no longer living with him is simply an instance of the general rule as to misconduct by an agent of such a character as to determine all rights under the contract of agency. In Lush on Husband and Wife, 3rd ed., pp. 394, 407, the law is stated in this way. It is there said not that if the wife is continuously unchaste by living in adultery, but if she commits an act of unchastity her right to pledge her husband's credit is determined. The first point of law, therefore, taken by Mr. Croom-Johnson fails.

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(1) (1858) 28 L. J. (P.) 12.
(2) (1888) 13 P. D. 141.
(3) [1924] 2 K. B. 587, 600.
(4) [1911] P. 120.

The second point was that in any view the common law rule does not apply where the solicitor is acting, not for a wife who is attacking her husband, but where he is acting for a wife who is defending herself from an attack by her husband. Again, I have been unable to find any authority for that distinction in the common law. By the practice of the Divorce Court the husband is frequently ordered to give security for his wife's costs before the truth of the charges made against her has been decided, and sometimes the husband is actually ordered to pay over the wife's costs to the solicitor acting for the wife who is defending the husband's petition. But it has been repeatedly said in the common law Courts that whatever may be the practice of the Divorce Court, the common law rules as to principal and agent apply in the common law Courts, and that if the solicitor does not use the rights he may have under the Divorce Court rules to secure his costs, he is not entitled to sue at common law to recover the costs incurred by him when acting for a wife who at the time had been unchaste, whether the solicitor knew or did not know that the wife had been unchaste. It is unnecessary to deal with this at greater length in view of the decision of this Court in *Durnford* v. *Baker* (1), where practically what I have just said was laid down. In that case the wife started proceedings for divorce; the husband discovering, as he thought, that the wife had been guilty of adultery filed a cross-petition, whereupon the wife's petition was abandoned and her solicitor not having got security for costs in the Divorce Court sued to recover them at common law. It was held that the solicitor was not entitled to recover, because although he had reasonable grounds for believing that the charges of adultery would be established against the husband, he had to take the risk of his own client, the wife, misinforming him as to her own conduct, and as she had committed adultery she was not entitled to pledge her husband's credit for the costs of her divorce petition. It will be noticed that the facts there were practically identical with those of the present case. There the wife started proceedings and the husband cross-petitioned: the solicitor acted for the wife in both proceedings in ignorance of the fact of the wife's adultery. The only point in that case which requires consideration is the passage in my judgment where I said that "there may be—and in the authorities there is some ground for thinking that there may be—an exception where the wife is defending herself against proceedings brought by the husband. But I can find no such exception where the wife is the attacking party, and I am not going to make it: I think it would be a great pity so to do." I suppose

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(1) [1924] 2 K. B. 587.

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that when I said that in the authorities there might be some ground for making such an exception where the wife was defending herself I must have had something before me to that effect. But I have been unable to discover any authority to justify it or any reason why I made the observation, unless I was thinking of the divorce practice. On further consideration I can see no ground in common law proceedings for making the distinction suggested between the position of a wife who is the attacking party and her position as a defending party. This second point put forward by Mr. Croom-Johnson also fails, and the appeal must be dismissed.

Greer L.J. I am of the same opinion. Mr. Croom-Johnson has argued this case with that lucidity, persistence and opulence of authority and illustration which his clients, whether professional or lay, are entitled to expect, and with regard to which their expectations are rarely disappointed. But he has failed to convince me that this appeal ought to succeed. I can add very little to what has been said upon the questions involved, but I will add a few words on each of the two points of principle.

This is an action by solicitors at common law and it is founded upon the law of agency. Unless the plaintiffs can make out that when they were retained, and throughout their retainer, the defendant's wife was the defendant's agent to pledge his credit the action necessarily fails. It is an undoubted principle of law that where a wife is living apart from her husband and the husband wrongfully refuses to maintain her she has a right to pledge his credit for necessaries, and one of the matters always regarded as included in the term "necessaries" is the power of the wife to instruct a solicitor to defend her from proceedings taken against her by her husband, to appear for her in proceedings taken by her against her husband, and also, it may be, to appear for her in proceedings which she has taken to protect her interests when living apart from her husband. However that may be, there is a well established exception to that rule—namely, that where the wife has committed adultery she is not entitled to pledge her husband's credit, nor entitled to apply for alimony against her husband in a court of summary jurisdiction. It was contended by Mr. Croom-Johnson that that exception applies only where the wife is living in continuous adultery. I can see no ground for thinking that to be the true state of the law. The question is whether a wife who has committed a fundamental breach of the marriage contract can insist upon the right of support which is given by the marriage contract. The fact that in the older cases in which the question almost invariably arose with regard to a wife living in continuous adultery the judges described her as continuously living in open adultery does not show that continuous adultery was the ratio decidendi of their decisions. The wife was referred to in those cases as living in open adultery, because that was the fact. When the question came up in *Durnford* v. *Baker* (1) and *Arnold & Weaver* v. *Amari* (2) it was decided that it was unnecessary to prove more than that there were acts of adultery on the part of the wife before the obligation to pay for the necessaries arose. That, I think, is sufficient to deal with the question of principle.

[The Lord Justice then considered the facts, and while entertaining a doubt whether there was sufficient evidence to justify the jury in finding that the wife had been guilty of adultery before the retainer given to the plaintiffs, he was not prepared to say that the verdict was so much against the evidence as to justify the Court in ordering a new trial.]

Slesser L.J. I agree, and would have been content to add nothing beyond saying that I accept the view expressed by Scrutton L.J. were it not for one argument which if accepted would have such serious consequences that I think it my duty to comment upon it. The argument is that although the husband is under no obligation to support his wife and that she has no implied authority to pledge his credit when she is living in adultery, that rule, which is based upon the law

(1) [1924] 2 K. B. 587. (2) [1928] 1 K. B. 584.

of agency, does not apply where the wife has committed one or two isolated acts of adultery. In Lush on Husband and Wife, 3rd ed., pp. 394, 407, it is pointed out that chastity is the condition which is essential to make the husband liable; but apart from the weighty observation of that learned author it follows from the very nature of the marriage tie that an act of adultery brings the whole relation into an entirely different sphere. It is a condition of the contract of marriage that the spouses shall be and continue chaste. Mr. Croom-Johnson has contended that one act of adultery by the wife is not the same thing as if she were living in adultery, but he has produced no authority in support of that contention. In *Arnold & Weaver* v. *Amari* (1) only two acts of adultery were alleged, and it was held by Sankey J. that the wife could not pledge her husband's credit for costs. In my view the argument addressed to us is not well founded. When it is shown that the wife has not been chaste she has destroyed the foundation of the matrimonial contract, and therefore it can no longer be said in circumstances such as the present that the husband is responsible in agency.

*Appeal dismissed.*

Solicitors for appellants: *H. S. Wright & Webb.*
Solicitors for respondent: *Rubinstein, Nash & Co.*

(1) [1928] 1 K. B. 584.

J. S. H.

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*Feb. 26;*
*March 7.*

## TAYLOR *v.* TWINBERROW.

*Landlord and Tenant—Tenancy from Year to Year—Sub-tenancy at Will—Sale of Freehold to Tenant—Merger of Tenancy in Freehold—Adverse Possession by Sub-Tenant at Will—Title as against Freeholder—Action for Possession—Limitation of Action—When Time begins to run—Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 27), *ss.* 7, 34.

In 1900 the plaintiff's father became the yearly tenant of a cottage, which he thereupon allowed the defendant's husband to occupy rent free as tenant at will. In February, 1919, the plaintiff's father purchased the freehold of the cottage. In 1925 the defendant's husband died and she continued to occupy the cottage on the same terms. In 1928 the plaintiff's father died, having by his will devised the cottage to the plaintiff. In October, 1929, the plaintiff brought an action in the county court against the defendant for possession of the cottage, in which a plea by the defendant that the claim was statute barred was overruled, and judgment was given for the plaintiff. On appeal:—

*Held,* that when the plaintiff's father purchased the freehold of the cottage in 1919 his yearly tenancy merged in the freehold and the rights which the defendant's husband had acquired against him as yearly tenant under the Real Property Limitation Acts, 1833 and 1874, were gone, and, as the new statutory period against him as freeholder under these Acts had not determined at the date when the action was brought, the defendant's plea failed and the judgment in favour of the plaintiff should be affirmed.

*Tichborne* v. *Weir* (1892) 67 L. T. 735 followed.

*Walter* v. *Yalden* [1902] 2 K. B. 304 discussed and distinguished.

*Rankin* v. *M'Murtry and Wife* (1889) 24 L. R. I. 290 disapproved in part.

Appeal from Winchcombe County Court.

By a lease in writing dated May 18, 1900, Mrs. Emma Ferguson granted to Mr. Alfred Henry Taylor a tenancy from year to year of a piece of freehold land and a cottage and other buildings thereon at Bishop's Cleeve in the county of Gloucester at an annual rent of 25*l.* with an obligation upon the tenant to keep the property in repair. At the commencement of the tenancy Mr. A. H. Taylor placed his brother-in-law, Mr. Twinberrow, who was his then foreman, in occupation of the cottage rent free, and, on the latter's employment as foreman ceasing shortly afterwards, allowed him to remain in occupation of the cottage rent free, Mr. Taylor himself continuing to discharge all the obligations under his tenancy by paying rent, rates and taxes and keeping the property in repair. On February 5, 1919, the executors of Mrs. Ferguson sold the freehold reversion of the property comprised in the tenancy to Mr. A. H. Taylor, who thus became the freeholder thereof. Mr. Twinberrow remained in occupation of the cottage until his death in 1925, and thereafter his widow continued in occupation on the same terms. In 1928 Mr. A. H. Taylor died, having by his will devised the property to his son, Mr. Horace William Taylor. Mr. H. W. Taylor on becoming entitled to the property requested Mrs. Twinberrow to give up possession of the cottage, but she refused to do so on the ground that her late husband had acquired a yearly tenancy of the cottage under the Real Property Limitation Act, 1833 (1), and that she as his successor in title could not be dispossessed without having been served with a notice to quit legally terminating the tenancy. Mr. H. W. Taylor thereupon gave Mrs. Twinberrow a week's notice to quit.

Subsequently, on October 24, 1929, Mr. H. W. Taylor brought the present action against Mrs. Twinberrow claiming possession of the cottage, and in his particulars of claim he stated that he asked for relief on the footing that the defendant had been in possession of the cottage as his weekly tenant

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(1) The Real Property Limitation Act, 1833, provides :—

Sect. 7 : " When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined . . . ."

Sect. 34 : " At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), provides :—

Sect. 1 : " . . . . no person shall . . . . bring any action or suit, to recover any land or rent but within twelve years next after the time at which the right . . . . to bring such action or suit, shall have first accrued to some person through whom he claims ; or . . . . to the person making or bringing the same."

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at a rent of 4*s*. a week and that he had duly determined that tenancy by notice to quit.

The defendant, in addition to other defences, set up the special defence that the plaintiff's claim was barred by a Statute of Limitations.

On November 20, 1929, the action was tried in the county court.

At the hearing counsel for the plaintiff abandoned his claim that the defendant had become a weekly tenant, and alleged that she and her late husband had throughout occupied the cottage as guests, or alternatively that her late husband at the time of his death was merely a tenant at will, and that the defendant had no larger estate or interest in the cottage.

The county court judge held that when on February 5, 1919, the plaintiff's father purchased the freehold of the property his lease became merged in the freehold, that the statutory period of limitation in favour of the defendant's husband and herself and as against the plaintiff's father and himself only began to run as from that date and had not expired at the date when the action was brought, that the defendant had failed to establish her title under the statute, and that the plaintiff was entitled to an order for possession.

The defendant appealed on the ground that the county court judge was wrong in law in holding that the plaintiff's claim was not barred by the statute.

*A. Terence Adams* for the defendant, appellant. The order of the county court judge giving the plaintiff possession of the cottage was wrong and should be set aside. The plaintiff's right to recover possession of the cottage was barred by the Limitation Acts. The Real Property Limitation Act, 1874, s. 1, provides that no person shall bring an action to recover any land but within twelve years next after the right to bring such action shall have first accrued. The Real Property Limitation Act, 1833, s. 7, provides that where any person shall be in possession of any land as tenant at will, the right of the person entitled subject thereto to bring an action to recover such land shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. In the present case in 1900 the plaintiff's father was granted a tenancy from year to year of the cottage which had never been determined by notice to quit, and in and after that year he permitted the defendant's husband to be in possession of the cottage as tenant at will. Accordingly, under the sections mentioned the right of the plaintiff's father to bring an action for possession of the cottage first accrued one year after the commencement of the defendant's husband's tenancy at will and continued for only twelve years thereafter—namely, until 1913, when it came to an end. Moreover, it would seem that in that year by virtue of s. 34 of the Act of 1833 the yearly tenancy of the plaintiff's father was extinguished: see per Sankey J. in *Nicholson* v. *England*. (1) Though the title of the plaintiff's father to the yearly tenancy was not by these provisions directly transferred to the defendant's husband as the person in adverse occupation, yet the title gained by the latter was commensurate with that which the plaintiff's father lost by the operation of the Acts, and was therefore also a yearly tenancy: see Darby and Bosanquet's Statutes of Limitations, 2nd ed., p. 494. A yearly tenancy is a tenancy for an indefinite period which continues until it is determined by notice to quit from the landlord: per Parke B. in *Oxley* v. *James* (2); and that was therefore the nature of the interest which the defendant's husband acquired in the cottage. When the plaintiff's father purchased the freehold of the cottage in 1919 his yearly tenancy was extinguished, having been transferred to the defendant's husband by operation of the Acts, and there could not therefore be any merger of it in the freehold. The purchase of the freehold by the plaintiff's father did not however determine the yearly tenancy which the defendant's husband had acquired as against him under the Acts: see *Walter* v. *Yalden*. (3)

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(1) [1926] 2 K. B. 93, 108.
(2) (1844) 13 M. & W. 209, 215.
(3) [1902] 2 K. B. 304.

That yearly tenancy has never been determined by notice to quit from the landlord, and the defendant is now entitled to it as the successor of her husband.

If the defendant is a weekly tenant at a rent of 4*s.* a week, then presumably the cottage is within the Rent Acts and the plaintiff cannot recover possession of it from the defendant. In any case it was in the discretion of the county court judge whether or not to make an order for possession.

*H. J. Barclay* for the plaintiff, respondent. The county court judge was right in making an order for possession of the cottage by the plaintiff. The Limitation Acts have no application to the present case, because the defendant's husband and herself have never had adverse possession of the cottage, their occupation of it having all along been that of a guest and not that of a tenant at will, as appears from the fact that the plaintiff's father and the plaintiff have continuously paid the rent and rates of the cottage and done the repairs thereto: *Peakin* v. *Peakin.* (1)

Even if the defendant's husband and herself were in occupation of the cottage as tenants at will, the defendant is not entitled to retain possession of it as against the plaintiff. By the combined operation of s. 7 of the Real Property Limitation Act, 1833, and s. 1 of the Real Property Limitation Act, 1874, the period of limitation began to run against the plaintiff's father and in favour of the defendant's husband at the end of a year after 1900 when the tenancy at will commenced and came to an end twelve years thereafter—namely, in 1913. By s. 34 of the Act of 1833 the effect of the determination of the period of limitation in the latter year was no doubt to extinguish the right of the plaintiff's father as yearly tenant to bring an action against the defendant's husband for recovery of the cottage, but it had not the effect of transferring the right and title of the former as yearly tenant of the cottage to the latter or of otherwise giving the latter any title to the cottage: *Tichborne* v. *Weir.* (2) In 1919, when the plaintiff's father purchased the cottage, his yearly tenancy of it merged in the freehold.

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(1) [1895] 2 I. R. 359.

(2) 67 L. T. 735.

His yearly tenancy was then extinguished, and so also were all the rights which the defendant's husband had acquired against him as yearly tenant under the Limitation Acts. The case of *Walter* v. *Yalden* (1) was a case of surrender and not of merger, and it is distinguishable from the present case. Further, that case is inconsistent with the decision of the Court of Appeal in *Tichborne* v. *Weir.* (2) A new period of limitation no doubt began to run against the plaintiff's father as freeholder and in favour of the defendant's husband, but that period had not determined at the time when the present action was brought, and the plaintiff is therefore entitled to maintain the action and to recover possession of the cottage from the defendant.

*Adams* in reply. In 1913 when the defendant's husband had been in occupation of the cottage for the statutory period he acquired by operation of law a transfer of the yearly tenancy of the plaintiff's father, and his title to it, which was good not only as against the latter but also as against the freeholder, and therefore remained good against the plaintiff's father after his purchase of the freehold in 1919: *Walter* v. *Yalden* (1) and *Rankin* v. *M'Murtry.* (3) It is submitted that *Tichborne* v. *Weir* (2) was not rightly decided.

SCRUTTON L.J. The question in this appeal is whether an order made by His Honour Judge Macpherson granting to Horace James Taylor possession of a cottage then occupied by Isabella Twinberrow, widow of Mr. Twinberrow, deceased, was rightly made. The appellant argued that the operation of the Statutes of Limitation prevented Mr. H. J. Taylor from recovering possession from her.

The facts were as follows: In 1900 Mrs. Emma Ferguson, who was then the purchaser, granted a tenancy from year to year to Alfred Henry Taylor, father of H. J. Taylor, of a cottage and lands. A. H. Taylor allowed his brother-in-law, Twinberrow, to live in the cottage rent free from 1900, at first as his foreman then as a relative whom he was benefiting.

(1) [1902] 2 K. B. 304.

(2) 67 L. T. 735.

(3) 24 L. R. I. 290.

In 1919 A. H. Taylor purchased the freehold from the executors of Emma Ferguson, and himself became the freeholder. In 1925 Mr. Twinberrow died, and his widow stayed on in the cottage rent free. In 1928 A. H. Taylor died, and his son H. W. Taylor under his will became freeholder of the cottage. The widow then claimed a title by adverse possession.

It was argued for her, as I understood the argument, that her husband was at first a tenant at will and that by virtue of s. 7 of the Real Property Limitation Act, 1833, time began to run against A. H. Taylor one year after the commencement of the tenancy, and therefore that in 1913 Twinberrow acquired a title against A. H. Taylor; that that title was the same title as Taylor had, a tenancy from year to year; that the merger of Taylor's title as tenant in his title as freeholder by purchase did not affect Twinberrow's title as tenant from year to year, which passed on his death to his widow; that there had never been any notice to determine that tenancy from year to year; and that consequently the widow remained in possession till a proper notice to terminate such a tenancy was given and expired.

The fallacy of this argument rests in my opinion in a misunderstanding of the legal effect of the expiry of the twelve years' adverse possession under s. 7 of the Act of 1833. It is treated as if it gave a title, whereas its effect is merely negative to destroy the power of the then tenant A. H. Taylor to claim as landlord against his sub-tenant in possession. It would not destroy the right of the freeholder, if Taylor's tenancy was determined, to eject the sub-tenant. The freeholder would not be in any way bound by the legal relations between tenant and sub-tenant after the expiry of the tenant's tenancy. That this is so appears to follow from the decision of the Court of Appeal in *Tichborne* v. *Weir*. (1) A freeholder in 1802 granted a lease to B.—a tenant—for eighty-nine years with a repairing covenant. B. equitably mortgaged the lease to G., who in 1836 entered into possession against B. and did nothing to acknowledge

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(1) 67 L. T. 735.

B.'s title for forty years, thereby as against B. obtaining a defence under the Statute of Limitations. G. and his subsequent assignee of his interest paid the rent named in B.'s lease to the freeholder, and in 1891, on the expiry of the term in the lease, delivered up the house to the freeholder, who sued the assignee on the repairing covenant. It was held by the Court of Appeal that the Statute of Limitations had not the operation of transferring to G. B.'s rights against and obligations to the landlord but only of extinguishing B.'s rights against G. "The statute," said Bowen L.J., "makes no transfer of any kind. . . . . The most that can be said is that he [G.] acquired an absolute title to the land as against everybody but the landlord." (1) The result of this case is in my opinion correctly stated in Darby and Bosanquet's Statutes of Limitations, 2nd ed., p. 493, as follows: "It has been said that the effect of the statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple. But the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him." The appellant relied on a passage in the same work on p. 494, where it is suggested that the person taking the benefit of the statute does acquire a title commensurate to the title lost. The authority cited for this is the Irish decision of *Rankin* v. *M'Murtry.* (2) But that case proceeds on the authority of statements of Lord St. Leonards in *Incorporated Society* v. *Richards* (3) and Parke B. in *Doe* d. *Jukes* v. *Sumner* (4), which Bowen L.J. in *Tichborne* v. *Weir* (5) held to be overstrained in construction and not to have the effect attributed to them. I prefer to follow the decision of the English Court of Appeal, and think the second passage in Darby and Bosanquet is inconsistent with the first passage in that work and is incorrect.

(1) 67 L. T. 737.

(2) 24 L. R. I. 290, 297.

(3) (1841) 1 Dr. & War. 258, 289.

(4) (1845) 14 M. & W. 39, 42.

(5) 67 L. T. 735.

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A further argument of the appellant was to this effect, that the decision in *Walter* v. *Yalden* (1) showed that a surrender by tenant to landlord did not defeat the rights of a sub-tenant who had acquired a right against his immediate landlord by virtue of the Statute of Limitations, and such a sub-tenant's right lasted as long as the original lease from landlord to tenant would have lasted but for the surrender, but that the statute did not begin to run against the landlord till that time. But, first, this decision shows that time did not begin against the landlord till 1919, the date of the merger, and had therefore not expired in 1929, when this action was brought; and secondly, while a surrender cannot affect the lawful title of an under lessee, whose sub-lease must be properly determined by notice in a regular manner, because a surrender has only the same effect as an assignment (*Walter* v. *Yalden* (1); *Pleasant* lessee of *Hayton* v. *Benson* (2)), which would not destroy a sub-lease, there is no decision that merger resulting from the tenant's purchase of the landlord's reversion has any such effect. If the merger takes place the original lease is determined; there is no need to give six months' notice to terminate a tenancy from year to year. The new reversioner cannot give notice to himself as the old tenant; and, as has been seen, the sub-tenant has no term which requires such a notice to be given to him.

For these reasons the appeal fails and must be dismissed with costs. There must be an order for the payment out of Court to the plaintiff of the sum paid into Court as the condition of a stay.

LAWRENCE L.J. This appeal raises a question of some interest under the Limitation Act, 1833. [His Lordship stated the facts, the nature of the action, and the course of the proceedings in the county court, and continued as follows:] The first question which arises is in what character did the defendant and her late husband occupy the cottage? It is contended on behalf of the plaintiff that the true inference to be drawn from the facts is that

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(1) [1902] 2 K. B. 304.

(2) (1811) 14 East, 234.

A. H. Taylor remained throughout in possession of the cottage and merely allowed the defendant and her husband to live in it as his guests. In support of this contention counsel relied upon the decision in the Irish case of *Peakin* v. *Peakin*. (1) In my judgment that case is distinguishable on the facts from the present case, which in turn is indistinguishable from and governed by the decision of the Divisional Court in England in *Lynes* v. *Snaith*. (2) In the last mentioned case it was held that the defendant, who had been allowed by the owner (her father-in-law) to take possession of a cottage belonging to him and to live there rent free, became a tenant at will although the owner paid the rates and taxes and did the repairs. On this point therefore the plaintiff fails.

The next and principal question is what is the legal effect of the defendant's husband having been allowed to remain in possession of the cottage rent free after his employment as foreman had ceased, when in my opinion he became tenant at will. Under s. 7 of the Limitation Act, 1833, time began to run against A. H. Taylor at the expiration of one year from the commencement of Twinberrow's tenancy at will. Under the joint operation of the Limitation Act, 1874, and s. 34 of the Limitation Act, 1833, A. H. Taylor's right and title to the cottage became extinguished in or about the year 1913. His only title immediately before the extinction was that of a yearly tenant whose interest is defined by Parke B. in *Oxley* v. *James* (3) as being "for an indefinite period subject to determination by notice to quit from his landlord."

It is clear therefore, first, that the right which A. H. Taylor had during the subsistence of his yearly tenancy to dispossess Twinberrow had become extinguished in 1913, and, secondly, that the right of the freehold reversioner on the termination of A. H. Taylor's yearly tenancy to obtain possession of the cottage had not in any way been affected by the extinction of A. H. Taylor's rights against Twinberrow.

(1) [1895] 2 I. R. 359.
(2) [1899] 1 Q. B. 486.
(3) 13 M. & W. 209, 215.

It is also clear that on the purchase of the freehold reversion by A. H. Taylor in 1919 his yearly tenancy terminated by merger.

Prima facie therefore it would seem that with the termination of A. H. Taylor's yearly tenancy the right to possession which Twinberrow had acquired under the Limitation Acts against everybody except the freeholder also terminated, and that on Twinberrow being allowed by A. H. Taylor to remain in occupation of the cottage after such termination a new tenancy at will was created, and time first began to run under the statute at the expiration of one year from the commencement of that tenancy—namely, in February, 1920.

The defendant, however, contended that A. H. Taylor could not by acquiring the freehold reversion deprive Twinberrow of the right which he had then acquired under the Limitation Acts, which right was alleged to be a yearly tenancy only determinable by the freeholder on giving a notice appropriate to such a tenancy.

This contention was based mainly on the decision of the Divisional Court in *Walter* v. *Yalden*. (1) In that case a lease of certain premises had been granted in 1837 for a term of ninety-nine years if three named persons should so long live at a nominal rent of one shilling. The lessees apparently vacated the premises, which were taken possession of by the defendant's predecessor in title as a trespasser in or about the year 1854. In 1885 the executors of the surviving lessee by deed surrendered the lease to the freehold reversioner, and thereupon the term became merged and extinguished. In 1895 the last of the three lives named in the lease dropped. In 1902 the freeholder commenced an action for possession against the person then in possession, who claimed title under the original trespasser. In these circumstances the defendant pleaded that the statute began to run from the date of the surrender of the lease in 1885 when the reversioner acquired an immediate right of re-entry. The Court negatived that contention on the ground that the defendant and his

(1) [1902] 2 K. B. 304.

predecessors in title, having acquired the right to possession of the premises as against the lessees, the latter could not by assignment or underlease deprive him of that right, and consequently that the statute did not begin to run against the freehold reversioner until the dropping of the last life in 1895. Lord Alverstone C.J. in delivering the leading judgment approved of the passage in Darby and Bosanquet's Statutes of Limitation, 2nd ed., p. 494, to the effect that the title gained under the statute by possession is commensurate with the interest which the rightful owners have lost and must therefore have the same legal character. The authority cited for this passage is *Rankin* v. *M'Murtry* (1), where the Divisional Court in Ireland approved of and followed the dicta of Parke B. in *Doe* d. *Jukes* v. *Sumner* (2) that "the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed," and of Lord St. Leonards (in *Scott* v. *Nixon* (3)), that "the statute has executed a conveyance to the party whose possession is a bar."

Mr. Adams contended with much force that the principle upon which *Walter* v. *Yalden* (4) was decided applied equally to the converse case, such as the present, where the tenant has brought about the merger by acquiring the reversion. I confess to finding it difficult to reconcile the decision of the Divisional Court in *Walter* v. *Yalden* (4) with the decision of the Court of Appeal in *Tichborne* v. *Weir* (5), which case was not cited to the Divisional Court. Be that as it may, however, *Walter* v. *Yalden* (4) is in my opinion distinguishable on the facts from the present case. There the lease was for a definite term on the expiration of which the lease would automatically come to an end and no notice was required to bring about its termination, whereas in the present case the tenancy was for an indefinite period determinable only by a proper

(1) 24 L. R. I. 290.
(2) 14 M. & W. 39, 42.
(3) (1843) 3 Dr. & War. 388, 407.
(4) [1902] 2 K. B. 304.
(5) 67 L. T. 735.

notice, and such a notice could not be given after the estate of the landlord and the estate of the tenant had become united in the same person. Moreover in that case the merger had been brought about by an assignment of the lease for the remainder of the term and it might plausibly be contended that until the term created by the lease had expired by effluxion of time the lessor was practically in the position of a person deriving title under the lessee, whereas in the present case A. H. Taylor never was in such a position. For these reasons I am of opinion that the decision in *Walter* v. *Yalden* (1) does not govern the present case.

In *Tichborne* v. *Weir* (2) the question was whether the defendant, whose predecessor in title had under the statute acquired a right to the possession of the property comprised in the lease and had paid the rent reserved by the lease to the reversioner, was liable under the repairing covenants in the lease. The Court of Appeal in negativing such a liability held that s. 34 of the Limitation Act, 1833, did not operate to transfer the title of the lessee to the person who had gained a title to the property under the statute. This decision definitely settled the controversy which had previously existed as to the legal operation and effect of the Limitation Acts, and it is somewhat surprising that it did not find a place in the authorized Law Reports. Bowen L.J., after having stated that the statute made no transfer of any kind but only barred the remedy and extinguished the title of the lessee, said that the argument on behalf of the lessor was overstraining the dicta of Lord St. Leonards and Parke B. (to which I have already referred), and construing them to mean more than what is said in the Act. The learned Lord Justice then cited and approved of the opinions expressed in Dart's Vendor and Purchaser and in Haynes on Conveyancing that the statute does not operate as an alienation of the estate of the rightful owner.

Applying the principle laid down by *Tichborne* v. *Weir* (2) to the present case, it follows that A. H. Taylor's yearly tenancy of the cottage was never transferred to Twinberrow

(1) [1902] 2 K. B. 304.

(2) 67 L. T. 735.

and that A. H. Taylor never came under any contractual or other obligation to Twinberrow which precluded him from terminating his yearly tenancy by acquiring the reversion or from exercising his rights as the freeholder after such acquisition.

In the result, for the reasons stated, I think that the learned county court judge was right, and that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for appellant: *Braund & Hill, for Baker & Smith, Tewkesbury.*

Solicitors for respondent: *Ivens & Thompson, Cheltenham.*

J. R.

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## THE KING *v.* DIVINE.

## *Ex parte* WALTON.

1930
*Feb.* 10;
*March* 17.

*Coroner—Inquest—Jury—View—Depositions—Coroners Act,* 1887 (50 *&* 51 *Vict. c.* 70), *s.* 4, *sub-s.* 2; *s.* 6, *sub-s.* 1.—*Coroners (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 59), *s.* 19.

By the Coroners Act, 1887, s. 6, sub-s. 1, the Court upon application made under the authority of the Attorney-General may order an inquest to be held if it is satisfied either (*a*) that a coroner refuses or neglects to hold an inquest which ought to be held; or (*b*) where an inquest has been held, that "by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry or otherwise, it is necessary or desirable in the interests of justice, that another inquest should be held."

In exercising its powers under this section the Court will not attend to mere informalities, nor minutely criticize the summing up or the nature of the evidence or the procedure. But if the inquest is so conducted that there is a real risk that justice has not been done, the Court will not allow the inquisition to stand.

The duties of coroners in summoning a jury, holding a "view," taking evidence, and directing the jury, considered and explained.

RULES NISI for certiorari calling upon the coroner for Kingston-upon-Hull to show cause why inquisitions on inquests held by him on December 5 and 6, 1929, with a jury, into the deaths of two men should not be brought up

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and quashed. The inquests resulted in a verdict of manslaughter against the applicant, who was committed for trial on the coroner's inquisitions. The grounds of the rules were that the proceedings were irregular in the following particulars (inter alia): (1.) That the jury was improperly selected; (2.) that the coroner viewed and discussed a damaged vehicle before the inquest with a man who afterwards acted as foreman of the jury; (3.) that the coroner joined the jury in their inspection; and (4.) that the coroner failed to read over the notes of their evidence to the witnesses before they signed them. It was stated in one of the affidavits that the coroner confined his selection of jurors to a panel of sixteen or seventeen persons.

*Sandlands* for the coroner showed cause. The coroner's jury is not in the same position as the jury in a civil or criminal case. It is not improper for the coroner to view the scene of the accident or the surrounding circumstances, and the fact that jurymen accompanied him is not a ground for quashing the inquisition. The only grounds upon which, according to the authorities, inquisitions have been quashed are interference in the verdict of the jury or with their deliberations, corrupt misleading of the jury, or putting before them without warning evidence which is not upon oath: *Reg.* v. *Coroner of Staffordshire.* (1) In *Rex* v. *Wood* (2) the coroner interfered with the jury's deliberations in the jury room. As regards the reading over of the depositions by the coroner to the witnesses before they were signed, *Reg.* v. *Plummer* (3) contains observations by Gurney B. which support the view that this is essential; but these are not justified by the language of the statute (7 Geo. 4, c. 64, s. 4), which was then in force, and they are certainly not applicable to the Coroners Act, 1887.

[He referred to Taylor on Evidence, 11th ed., vol. i., pp. 360–362.]

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(1) (1864) 10 L. T. 650.
(2) [1928] 1 K. B. 302.
(3) (1844) 1 C. & K. 600, 604.

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As to fresh evidence being admitted, the coroner here desires that a new inquest be ordered, if the evidence appears to the Court to be material.

*Paley Scott* in support of the rule. The coroner should have read over the depositions to the witnesses before they signed them: *Reg.* v. *Plummer* (1), per Gurney B. Even before that case it was the settled practice that this should be done: Jervis on Coroners (1829), 1st ed., p. 235, where the author says that that is the usual practice, although it is not essential in order to render the depositions admissible in evidence. The duty of coroners as to evidence in cases of murder or manslaughter is stated in Umfreville's Lex Coronatoria (1761), vol. ii., p. 298, as follows: "Which after you have fully taken down, read it publicly over to the witness, and desire his attention to what you read. When this is done, ask the witness if it be the whole substance and effect of his testimony, and agreeable to what he deposed. If he answer yes . . . . let him sign it under this Information, to the right hand; and in the same manner proceed with the rest of the witnesses."

[He referred also to Halsbury's Laws of England, vol. viii., "Coroners," para. 611.]

There is no express provision on this point in the Coroners Act, 1887, but s. 4, sub-s. 2, requires the deposition to be "signed by the witness and also by the coroner," and the reading over of the evidence appears to be a necessary preliminary.

Here there was such "irregularity of proceedings" that it is at least "necessary or desirable in the interests of justice that another inquest should be held": Coroners Act, 1887, s. 6, sub-s. 1 (*b*). As to the new evidence, it is such that it is desirable that the previous inquisition be quashed, as provided in the Coroners (Amendment) Act, 1926, and another inquest be held.

[TALBOT J. referred to *Garnett* v. *Ferrand*. (2)]

*Cur. adv. vult.*

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(1) (1844) 1 C. & K. 600, 604.

(2) (1827) 6 B. & C. 611.

The Court (TALBOT, CHARLES and HUMPHREYS JJ.) quashed the inquisitions and ordered new inquests to be held before another coroner.

March 17. TALBOT J. read the judgment of the Court, which was as follows: These Rules were moved pursuant to the fiat of the Attorney-General, and were granted, calling upon Dr. Divine (one of His Majesty's coroners for the City and County of Kingston-upon-Hull) to show cause why a writ of certiorari should not issue to remove into this Court two inquisitions taken before him in December, 1929, on the bodies of two men who had been killed in a collision in a public road in or near the city, and why other inquests should not be held.

The Rules were applied for under s. 6 of the Coroners Act, 1887, and s. 19 of the Coroners (Amendment) Act, 1926, on the ground of (1.) irregularity in the proceedings at and connected with the inquest; and (2.) the discovery of new facts and evidence.

This second ground depends particularly on s. 19 of the Coroners (Amendment) Act, 1926, enacted "for the removal of doubts," doubts, that is, how far the "generality of the provisions" of s. 6 of the Act of 1887 empowered the Court to quash an inquisition and order a new inquest because of the discovery of new facts or evidence. The affidavits filed in support of the rule disclosed evidence as to which we will not say more than that it appears to be material and important; they also accounted satisfactorily for the fact that this evidence was not tendered at the inquests already held. [His Lordship read passages from the coroner's affidavit and continued:] Counsel who appeared to show cause stated that the coroner would prefer that if the Court thought fit to order new inquests so that this evidence might be considered, they should be held before the coroner of another district under s. 6, sub-s. 2, of the Act of 1887. In these circumstances we considered that the conditions laid down by the statute had been satisfied, and at the conclusion of the arguments we ordered new inquests accordingly. We wish to add that we must not be taken to give any encouragement to applications for fresh inquests merely on the ground that further evidence is available. We made absolute the rules in the present case, having regard to the nature of the evidence now disclosed, as to which for obvious reasons it is best to say nothing, and because the absence of it at the inquests is fully explained. The fact that the new inquests are ordered with the assent, and indeed we think we may say by the desire, of the learned coroner also weighed with us. We thought it right to give our decision at once upon this ground, which sufficiently supports it, as it was important in the circumstances of this case that there should be no delay.

We deferred our decision on the other points argued before us, and we now proceed to give it.

The first irregularity set forth in the order to show cause is that the coroner viewed and discussed a damaged vehicle before the inquest with a man who subsequently acted as foreman of the jury.

There is at Hull a peculiar practice as to the summoning of jurors for inquests which is described in Dr. Divine's affidavit, as follows: "I may well have referred to the said Joseph Ralph as one of my regular jurymen. I hold many inquests with juries and the practice of my court is always to require 11 jurymen to be summoned. As these are selected by the coroner's officer from a list or panel of 16 or 17 only it necessarily happens that some of the same persons are summoned as jurors time after time, and it follows therefore that most of the jurymen who can and who do attend are regularly summoned and become regular jurymen. . . . . I have nothing to do with their selection in any way."

Though it is, we believe, common to use the Voters' List as a list of jurors to be summoned for coroner's inquests, no list is prescribed by statute, and so long as the coroner obtains the attendance of the statutory number of duly qualified persons, the method by which he does it is left very much to his discretion. This is probably to be explained by the ancient history of these inquests. Originally the coroner's duty was to go to the place where a death which was to be inquired into had occurred, to summon the inhabitants of the neighbourhood, and inquire of them upon oath what they knew of the matter. Every one of twelve years old or upwards in the townships summoned was bound to attend: see the Statute De Officio Coronatoris (4 Edw. 1) and the Statute of Marlebridge, c. 25 (52 Hen. 3), both now repealed. Gradually no doubt (as in the parallel case of the grand jury) the functions of jurors and witnesses were distinguished, and for many centuries a limited number of jurors has been impanelled. We are not told how or by whom the panel at Hull is formed, or whether the origin of the practice prevailing there is known, but we are bound to say that to confine the area of selection to sixteen or seventeen persons out of a great city appears to us to be very objectionable. Apart from the obvious risk of practical inconvenience, it is in our opinion quite contrary to the principle of the jury system, which is the determination of questions of fact by persons taken at haphazard from the general body of qualified persons. It is an entire departure from this to have a small panel of "regular jurymen" who must be perfectly well known, and at any rate can easily be known, to every one in Hull who takes an interest in the matter. We are not called on to say whether or not the practice is actually illegal, and we express no opinion as to that, but it is in our view improper, and it has in fact led to what we hold to be an irregularity in the present case.

It appears from the evidence that on December 3, 1929, two days before the inquests were held, the coroner, accompanied by a man named Ralph, visited a garage belonging to one Bell, to whom the coroner introduced Ralph as "one of my regular jurymen," and desired to see a motor car which Mr. George Walton, against whom the jury afterwards brought in a verdict of manslaughter, was driving at the time of the collision. Mr. Bell showed them the car, and the coroner and Mr. Ralph then examined it together. They also examined the lorry in which the dead men had been, and the scene of the collision. Ralph was foreman of the jury at the inquests. He had also served on the jury at another inquest held by the coroner on December 3, and the same jury appears to have been summoned and to have served on both occasions. [His Lordship then read from Dr. Divine's affidavit his account of the incident and continued :] It is evident that the coroner contemplated that Ralph would have at the inquest knowledge which the other jurors would not or might not have, and that the others might have to depend on Ralph for a report of what he had seen. We can accept without reserve the coroner's statement that no "discussion" of the circumstances or causes of the accident took place between him and Ralph, though we do not suppose that their examination of the vehicles and their visit to the place of the collision passed in total silence ; but it is plain that there was ample opportunity for discussion if they had wished to discuss.

It was pressed upon us by counsel in showing cause that an inquest being a court not of trial, but of inquiry only, the procedure is much less rigid than at a trial proper whether criminal or civil, and it was argued that apart from dishonesty or deliberate partiality there was nothing to prevent the jury from satisfying themselves as to the facts in any way which they might think proper, so long as no material evidence was actually excluded at the inquest, and no evidence was formally taken except on oath. At common law the regular grounds on which inquisitions were quashed were defects appearing on the face of the verdict, and "misconduct" of the coroner or jury. "The verdict," says Sir J. Jervis, "is equivalent to an indictment and must be stated with the same legal certainty and precision": Jervis on Coroners, 1st ed., p. 253. This meant that one arraigned on a coroner's inquisition had the same right to have it quashed for defects as in the case of an indictment, and on such grounds it could be quashed either by the judge before whom he was arraigned or by the Court of King's Bench. The Court could also quash for misconduct, but this jurisdiction was kept within

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strict limits. Ordinarily unless the inquisition was bad on its face, it would only be quashed on the ground of fraud: *Reg.* v. *McIntosh.* (1) Even where unsworn evidence had been received the Court would not quash the inquisition unless it appeared that the verdict had been influenced by it: *Reg.* v. *Coroner of Staffordshire* (2); *Reg.* v. *Ingham.* (3) So in *Reg.* v. *Ingham* (3) the Court refused even to grant a rule nisi on the ground either that the coroner had misdirected the jury on law, or that there was no evidence to warrant the verdict. Again it is clear that a coroner's inquest is not bound by the strict law of evidence.

In Ireland the Court, proceeding upon its common law jurisdiction—the Coroners Act, 1887, never applied to Ireland—held that it was misconduct or irregularity for which an inquest should be quashed for the coroner to be in the jury room while they were considering their verdict: see *Reg.* v. *O'Brien and Bourchier* (*the Ballyragget case*) (4); *In re the Mitchelstown Inquisition.* (5) These cases were followed by this Court in *Rex* v. *Wood.* (6) Lord Hewart C.J. there rested his judgment on the ground that it is "clearly contrary to public policy" for a coroner to go into the jury room after the jury have retired to consider their verdict. Morris C.J. in *In re the Mitchelstown Inquisition* (5) used the same expression. The ground upon which the inquisitions were quashed in those cases is not exactly that upon which these rules were granted, though it is not unlike it. In our opinion it is "contrary to public policy" that a coroner should take, before an inquest is held, one or more persons who are to serve on the jury and privately investigate with them any of the facts of the case; and this whether or not it can be shown that there was anything in the nature of discussion. It is obvious that the condition of the vehicles involved in a collision and the aspect of the place at which it occurred, are among the facts material to be considered in an inquiry into the cause of the death

(1) (1858) 7 W. R. 52.
(2) 10 L. T. 650.
(3) (1864) 5 B. & S. 257, 260.
(4) (1882) 17 Ir. L. T. 34.
(5) (1888) 22 L. R. Ir. 279.
(6) [1928] 1 K. B. 302, 304.

of a person killed in the collision. We think therefore that even at common law the conduct of the coroner and Mr. Ralph in this case was misconduct for which this Court would have quashed the inquisitions. But in our opinion the Coroners Act, 1887, has materially enlarged the powers, and therefore the duty of the Court in this matter. By s. 6, sub-s. 1, the Court may quash an inquisition, and order a fresh inquest to be held if satisfied "that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held."

These are very wide words, and their generality is declared and guarded by the Coroners (Amendment) Act, 1926, s. 19. Moreover the fact that the powers conferred by the section can be exercised only upon an application authorized by the Attorney-General indicates that they are powers beyond those which the Court already had. The same appears from s. 35 of the Act. The words " necessary or desirable in the interests of justice " are the critical words. The Court is not to attend to mere informalities, nor to criticize minutely the summing-up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such that there is real risk that justice has not been done, a real impairment of the security which right procedure provides that justice is done and is seen to be done, the Court ought not to allow the inquisition to stand. No doubt a coroner has considerable latitude as to the way in which he may conduct an inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else. It is unnecessary to go into this in detail, but we think the language of the Act of 1887 throughout confirms what we have just said. See (to take one example) the words "so far as such particulars have been proved to them" in s. 4, sub-s. 3, where "proved" must mean "proved by sworn evidence" as provided by s. 4, sub-s. 1. It was argued that the words "and to the best of your skill and knowledge" in the form of jurors' oath in Sch. II. of the Act, when compared with s. 3, sub-s. 3, show that the jury is not confined to sworn evidence. We cannot think that there is anything in this. It would mean practically that a verdict could be properly based on anything which the jurors knew or could find out, and would in effect annul their obligation to give the verdict "according to the evidence." The argument gives to the words a significance much greater then they can fairly bear. It is of course no more possible at a coroner's inquest than at a trial, either criminal or civil, to secure absolutely that jurymen will not be influenced by things which they have heard or seen outside the Court. But at least nothing should be allowed which makes it certain that they will be so influenced; and it is clear that the proceedings of the coroner and Mr. Ralph in this case, however well intended, must have had this effect. It has been said over and over again that it is hardly more important that justice should be done than that it should appear to be done; and nothing is more certain to defeat this than that it should be evident that a jury have formed at any rate a provisional opinion on the case before hearing the evidence. The affidavits make it clear that that impression was necessarily conveyed by the part which Mr. Ralph as foreman of the jury took at the inquest. It would be wrong to impose a limit which the law has not imposed on the right of a coroner's jury to ask questions of witnesses; but no one can wonder that a man against whom a verdict of manslaughter has been found should feel that he has not been fairly treated, when questions are put to him by the foreman of the jury obviously based on information obtained outside the Court.

The next ground taken comprises three points: (1.) that the coroner joined the jury in an inspection and discussion of the damage to a vehicle involved in the collision; (2.) that he did not allow others to be present; (3.) that

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he allowed a police constable to speak and point things out to the jury. We take these in order. (1.) There is of course no objection whatever to a view by the jury of the vehicles concerned in the collision and of the place. Nor can we say that the coroner is doing anything wrong if he goes with the jury; though we think that probably as a general rule it is better that he should not. If he does, he should carefully abstain from any discussion of the case with them. We accept the sworn statement of the coroner in the present case that he did abstain.

[As to (2.) the Court was of opinion that the allegation was not proved, but as to (3.) the Court considered it improper for the constable to give information to the jury outside the Court and held this to be a ground for quashing the inquisitions. The judgment then continued:] The last ground of objection was that the coroner failed to read over his notes to the witnesses before they signed them. This matter is now regulated by the Coroners Act, 1887, s. 4, sub-s. 2. We do not doubt that if a coroner thinks that there is any uncertainty as to what a witness meant and particularly if a witness requests before he signs his deposition that it be read over to him, the coroner ought to do so; and no doubt a witness would be entitled to refuse to sign until this had been done. But we have no right to add a positive requirement such as is suggested to those which Parliament has enacted. We may notice that by the Indictable Offences Act, 1848, s. 17 (reproduced by s. 12 of the Criminal Justice Act, 1925), the justices are expressly required to cause a witness's deposition to be read over to him. We must take it that this was deliberately omitted from the Coroners Act, 1887.

We are of opinion that, apart from the new evidence, the irregularities mentioned about were good ground for making the rules absolute and quashing the inquisitions.

*Rule absolute.*

Solicitors showing cause: *Collyer-Bristow & Co., for Laverack, Wray, Iveson & Co., Hull.*

Solicitors in support: *Smith & Hudson, for Rollit & Farrell, Hull.*

F. P. F.

1930
*Feb.* 15.

# NEAR EAST RELIEF *v.* KING, CHASSEUR AND COMPANY, LIMITED.

[1928. N. 1151.]

*Insurance (Marine)—Broker's Lien on Policy—Balance on Account owing to him by Employer—Reason to Believe that Employer only an Agent—Knowledge acquired after Policy effected, but before Resumption of Possession of Policy, it having been Parted With—Revival of Lien—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 53, *sub-s.* 2.

By the Marine Insurance Act, 1906, s. 53, sub-s. 2, a broker who effects a policy of marine insurance on behalf of a person who employs him for that purpose has a lien on the policy in respect of any balance on any insurance account which may be due to him from that person, unless, when the debt was incurred, he had reason to believe that such person was only an agent:—

*Semble*, the same knowledge which, under this section, would defeat the establishment of a lien when the policy is effected is equally effective to defeat it if acquired between that time and that at which possession of the policy is resumed after it has been parted with. The lien, therefore, of a broker in respect of a balance on an account under this section which is due to him from his employer, who, at the time when the policy was effected, he had no reason to believe was only an agent, does not revive if the broker, having parted with possession of the policy to his employer, knows or has reason to believe, when it comes again into his hands, that his employer was only an agent.

Action in the Commercial List tried by Wright J. without a jury.

The plaintiffs, an American corporation, were, at all material times, interested to the amount of 625*l.* in seven cases of goods shipped by them at Beirut in the steamship *Braga*, in or about November, 1926. By a policy of marine insurance effected by the defendants, who were insurance brokers, at the request of the Marine and General Insurance Agency, acting on behalf of the plaintiffs, the Argonaut Marine Insurance Company insured the plaintiffs for 625*l.* on the cases at and from Beirut to New York against perils of the sea. The policy, which was in the ordinary form, was in the names of the defendants and other persons. While on the voyage, the goods were wholly lost in consequence of the perils insured against.

By their statement of claim the plaintiffs alleged that the defendants had refused to deliver the policy to them, but claimed that it was their property, and refused to take any steps to recover the policy moneys on behalf of the plaintiffs, the plaintiffs being thereby prevented from recovering the 625*l.* and so suffering damage. The plaintiffs claimed a declaration that the insurance was effected by the defendants on their behalf and that the policy was their property; the delivery up of the policy and damages for its detention; and damages for breach of duty.

The defendants admitted that they had effected the policy, but they said that it was made with them as the insured and/or as brokers for the Marine and General Insurance Agency. They claimed that they had a lien on the policy in respect of premiums owing to them on a general insurance account by the Marine and General Insurance Agency. The account showed that in November, 1926, as between the Agency and the defendants, there was an outstanding balance of 67*l.* 16*s.* 5*d.*, arrived at by taking the premiums on the one hand and sums received on the other. By the end of December the debit balance totalled 108*l.* Between then and March 5, 1927, 110*l.* was received by way of credits, without any appropriation, by the defendants, so that the 108*l.* was paid off at that date. During the same period various other debits were incurred between the parties, so that, in the result, the Agency incurred further liabilities to the extent of about 100*l.*

*Le Quesne K.C.* and *Quass* for the plaintiffs.

*Hildesley K.C.* and *Weitzman* for the defendants.

WRIGHT J. If the claim in this action were in respect of a particular lien for the premium in respect of this consignment, which amounted to 4*l.* 9*s.*, the claim could not be supported because, on established principles, the debt of 4*l.* 9*s.* has been paid off, that is to say, paid off because, on the principle of appropriation, the 110*l.* received between December, 1926, and March, 1927, must be deemed to have paid off the 108*l.* which was owing at the end of 1926. If any authority were needed for that it is to be found in the case of *Levy* v. *Barnard.* (1) So far as a particular lien is concerned, that decision is precisely in point, because there was in that case a running account, and at the date on which the policy was effected there was a debt of 21,000*l.* owing by the agents of the assured to the broker, which included the premium in question. Subsequently, payments were made to the extent of 33,000*l.* without any appropriation by anybody on either side, and the Court held that the whole of the 21,000*l.*, including the premium in question, must be taken to have been paid off. The same principle was recognized in *Hooper* v. *Keay* (2), where it was stated by Blackburn J. that the plaintiffs had blended two accounts striking a balance on the whole. The most recent recognition of the same rule is that in *Albemarle Supply Co.* v. *Hind & Co.* (3)

But I have to deal with the question whether or not there is a general lien of which the defendants here can avail themselves against the plaintiffs. I shall deal, first, with the first question argued—namely, whether the defendants have come within the rule now embodied in the Marine Insurance Act, 1906, s. 53, sub-s. 2. (4) This follows a statement of principle to be found in earlier cases—in particular in the judgment of Gibbs C.J. in *Westwood* v. *Bell.* (5) The language of the statute may appear to be a little peculiar because it begins by postulating that there has been employment of the broker by a person who has employed him as principal, which may seem to contradict the further proviso that the broker had reason to believe that the person employing him was only an agent. I think that the enactment has reference to form. It means that the broker may be

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(1) (1818) 8 Taunt. 149; 2 Moo. 34.

(2) (1875) 1 Q. B. D. 178.

(3) [1928] 1 K. B. 307, 319.

(4) By the Marine Insurance Act, 1906, s. 53, sub-s. 2: "Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent."

(5) (1815) 4 Camp. 349.

maintain the claim to a general lien. Generally, a lien which is lost on parting with possession revives when possession is resumed, but there is authority for the proposition that that rule does not apply to a general lien if, after possession is parted with, and before possession is resumed, the person claiming the general lien becomes aware that his immediate employer is only an agent and not a principal. In that case, it is said, the general lien cannot revive, any more than a general lien can arise originally under the statute when the person claiming it has reason to believe that the person with whom he is immediately dealing is only an agent.

There does not seem to be any express decision giving effect to this principle. It is referred to in Arnould on Marine Insurance, 11th ed., s. 134, and by Judge Duer in his Marine Insurance, vol. ii., pp. 290 and 360. Judge Duer states the principle in these terms at p. 290: "It has, however, been determined that where a policy, that the agent has surrendered, comes again into his possession, his lien is revived in all its original extent. But it must be understood as a necessary condition of this revival, that the policy when restored to his possession, remains the property of the principal who is his debtor. . . . So the general lien of a sub-agent for claims against his immediate employer, whom he considered as the principal, it is probable, would be held not to revive, if when the policy, with the possession of which he had voluntarily parted, comes again into his hands, he knows, or has reasonable grounds to believe, that his employer was himself a naked agent, having no interests of his own that were meant to be protected by the insurance. It would be inequitable, in such a case, to revive the lien to the prejudice of the party really assured." Judge Duer is not able to refer to any definite authority for this rule, except a somewhat obscure inference (at p. 360) from *Levy* v. *Barnard* (1) in particular from the judgment of Park J. Park J. mentions the fact that the brokers before they got back the policy, after relinquishing it temporarily to the plaintiff's agents, knew that the plaintiff was the owner of the goods insured. Judge Duer says that "this is evidently stated as the reason why the lien, as against the plaintiff, was not revived," and he observes that "if the Court made any determination in relation to a general lien, it probably was, that such a lien is not revived by the restoration of the policy to the broker, if he knew at the time, that another party, and not his employer, was entitled to the proceeds." The case as reported, however, goes on the fact that payments on account had discharged the lien and the judgments make no reference to any general lien. The author further supports his reasoning by the analogy of a case where it was held that the revival of a lien on restoration of the policy is subject to charges created while the policy was out of the broker's possession: *Spring* v. *S. Carolina Insurance Co.* (1)

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(1) 8 Taunt. 149; 2 Moo. 34.

However the question of authority may stand, I think that the opinion of the very eminent author is correct in principle, and that the same knowledge which would defeat the establishment of a lien when first possession is obtained is equally effective to defeat it when possession is resumed after possession has been parted with. There is no doubt that the revival of a lien may be subject to considerations arising from what has happened during the time during which possession has been parted with. As a general principle, general liens which involve charging a particular individual's property for another person's debt are not to be encouraged, and in the present case I hold that, when possession of the policy was resumed, the position was subject to the then state of knowledge of the defendants who received the policy back into their possession in accordance with the position then existing. The essential part of the position then existing was their knowledge that the policy was not the property of the Marine and General Insurance Agency, but the property of the plaintiffs. I think that their rights, if any, are determined by these considerations.

A third point taken by Mr. Le Quesne is that, as the total indebtedness of the Agency to the defendants to the end of

(1) (1823) 8 Wheat. 268.

1926 had been paid off, there could be no general lien in respect of debits subsequently incurred, because, by the end of December, 1926, the defendants were fully apprised of the fact that the insurance was effected not for the Agency but for the Agency's clients, the plaintiffs. He contends that, as the general lien is only claimed in respect of debts accruing after that date, it cannot be established. Clearly under the Act it is a necessary condition that, when the debt was incurred, the brokers had reason to believe that their employers were only agents, and, as all those debts in respect of which alone the general lien could be claimed were incurred after the knowledge that I have found had been acquired by the defendants, the general lien cannot be maintained. On that ground also the plaintiffs are entitled to succeed, and the defendants cannot justify the general lien they claim. Authority for that view, apart from the language of the statute, is to be found in *Maspons Y Hermano* v. *Mildred, Goyeneche & Co.* (1), where Lindley L.J. says: "According to our law, the right of the defendants to a lien or set-off depends on a question of fact—namely, whether the defendants did or did not know that Demestre & Co. were acting for an undisclosed principal before the defendants' alleged lien or right of set-off accrued?" That question of fact must be answered against the defendants in this case when once it is ascertained that the debts in respect of which the lien is claimed were incurred after the end of 1926, and after the defendants had express notice of the actual position of the plaintiffs and of the Agency.

On all these grounds there must be judgment for the plaintiffs, and an order for the delivery up of the policy and for 50*l.* damages in detinue.

*Judgment for plaintiffs.*

Solicitor for plaintiffs: *Ernest G. Scott.*
Solicitors for defendants: *Jacques Cohen & Co.*

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(1) (1882) 9 Q. B. D. 530, 543.

G. F. L. B.

Louis Dr v Tempus Sh. Co. (1931) A.C.

# FIUMANA SOCIETÀ DI NAVIGAZIONE *v.* BUNGE AND COMPANY, LIMITED.

1930
*March* 6, 7, 10, 11, 12.

[1928. F. 1685.]

*Shipping—General Average—Fire in Bunker Coal during Loading of Cargo—Spontaneous Combustion—Claim for Contribution from Cargo Owners.*

A steamship belonging to the plaintiffs was chartered to carry a cargo of grain from various ports in the River Plate and to deliver the same at Antwerp or Rotterdam. The charterparty provided that average, if any, was to be payable according to York–Antwerp Rules, 1924. It also contained an exceptions clause which provided that the steamer should not be liable for loss or damage occasioned " by fire from any cause or wheresoever occurring . . . . or any latent defects in hull, machinery or appurtenances . . . . arising in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the . . . . master, mariners or other servants of the shipowners . . . . (not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager)." The steamer bunkered at Rotterdam, where she took on board enough bunker coal to take her to the Plate and bring her back to Europe. She carried a cargo of coal from Cardiff to a port in the Plate and was kept waiting a fortnight before she could get into her berth to discharge that cargo. Shortly after she had arrived at her first loading port in the Plate and had commenced to load a cargo of maize a fire broke out by spontaneous combustion in her bunker coal, which had been on the ship for two and a half months since June 30, and had been carried through the tropics, and a portion of the bunker coal was shifted on to the deck. The ship then proceeded to another port in the Plate to complete loading her cargo of maize. On the way another fire was discovered in the bunker coal, which was extinguished after a fortnight and after discharging all the bunker coal on to the deck and subsequently replacing it in the bunkers. The owners of the steamer claimed to recover from the defendants, who were the indorsees of the bills of lading in respect of the cargo of maize, a contribution in general average for the expense so incurred:—

*Held*, that the unexplained occurrence of the fires afforded a reasonable presumption that they were due to a defect or unfitness of the bunker coal at the time of the loading of the cargo which amounted to a breach of warranty, and that as the ship was unseaworthy the plaintiffs could not recover a general average contribution from the cargo owners for sacrifice due to their own fault and breach of contract.

*Held*, further, that neither the exception in the charterparty of latent defects nor Rule D of the York–Antwerp Rules, 1924, which provided that a claim in general average was not to be barred because it arose by the default of the carrier, enabled the plaintiffs to maintain their claim for a contribution in general average.

ACTION in the Commercial List tried before Wright J.

The plaintiffs, the Fiumana Società di Navigazione, who were the owners of the steamship *Alberto Fassini*, claimed to recover from the defendants Bunge & Co., Ld., 1632*l*. 19*s*. 5*d*. as a general average contribution.

The *Alberto Fassini* had been chartered by the plaintiffs by a charterparty in the Centrocon form, dated August 11, 1927, to Messrs. Bunge & Borne Limitada of Buenos Ayres to carry a full and complete cargo of wheat and/or maize and/or rye, the steamer to be loaded at one or two safe loading ports or places in the river Parana, above San Lorenzo, but not higher than Santa Fe, always afloat, in proper rotation downwards, as much cargo as the master considered safe, but not more than the steamer could safely carry over bars without lightening, and the balance of the cargo at one or two safe loading ports or places not higher than San Lorenzo, and if required by the captain in the port of Buenos Ayres or La Plata, and to be discharged at Antwerp or Rotterdam.

The charterparty provided by clause 29 that "the steamer shall not be liable for loss or damage occasioned by the act of God, by quarantine restrictions, by perils of the seas, or other waters, by fire from any cause or wheresoever occurring . . . . by explosion, bursting of boilers, breakages of shafts or any latent defects in hull, machinery or appurtenances, by collision, stranding or other accidents arising in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners or persons for whom they may be responsible (not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager)." Clause 31 provided: "Average, if any, payable according to York-Antwerp Rules, 1924."

Bunge & Borne Limitada shipped a cargo of maize on the steamer, which was loaded partly at Santa Fe and partly at San Nicolas under bills of lading which incorporated the terms of the charterparty and of which the defendants, Bunge & Co., Ld., were the indorsees and to whom the property in the cargo had passed by reason of the indorsement.

1930

FIUMANA SOCIETÀ DI NAVIGAZIONE v. BUNGE & Co.

The *Alberto Fassini* bunkered at Rotterdam, which port she left on June 30, 1927, with 1618 tons of Westphalian coal on board, which amount was intended to take the vessel out to the Plate and back again to Europe. She carried a cargo of coal from Cardiff to Villa Constitucion. She was kept waiting in the roads at Villa Constitucion for fourteen days before she could get into her berth. She finished discharging her cargo of coal on September 7, and then proceeded to Santa Fe as her first loading port, where she arrived on September 10, and began to load.

On September 14 fire was discovered in the upper bunkers on both sides, and water was poured on to the bunker coals for two days, and about 200 tons were shifted on to the deck. The ship, with that amount of coal on deck, then proceeded to San Nicolas to complete loading. On September 21 fire was again discovered in the bunkers and water was poured into the bunkers to extinguish the fire. Loading of the cargo was completed by September 24, and on that day the crew began to shift the bunker coal on to the deck; this was completed on October 4. Water had been constantly used on the burning coal up to October 2. The bunker coal was all replaced in the bunkers by October 7, and the ship sailed on October 8.

The plaintiffs by their points of claim alleged that during the voyage from South America to Antwerp the *Alberto Fassini* sustained damage and loss by fire and bad weather, and in consequence sacrifices were made forming a charge upon the cargo recoverable in general average. It was alleged that a proper average statement was drawn up by average adjusters which showed that a general average contribution amounting to 1632*l.* 19*s.* 5*d.* was due from the defendants to the plaintiffs, and the plaintiffs alleged that the defendants wrongfully refused to pay that sum.

The defendants, by their defence, denied that the *Alberto Fassini* sustained any damage or loss by fire or bad weather or that any sacrifices were made in consequence thereof, or at all, or that any of the alleged sacrifices formed a charge upon the cargo or were recoverable in general

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average. They also denied that the average statement was properly made out according to the York–Antwerp Rules. The defendants said that the steamship was unseaworthy and unfit for the carriage and reception of the cargo at the commencement of and throughout the loading of the cargo at each port of loading, and during each stage of the voyage, and that all the loss and damage in question and matters alleged as general average were occasioned by such unseaworthiness or unfitness. The defendants gave as particulars that the bunker coal in the steamer was at all such times on fire and/or was so highly heated that it was certain or likely to ignite spontaneously shortly after the commencement of the loading or sailing and so delay or prevent the commencement and due prosecution of the voyage. The bunker coal did ignite spontaneously during the loading of the cargo at Santa Fe and by reason thereof the steamer was unable to commence or proceed on her voyage, or alternatively could not do so with safety to herself and cargo until coal had been taken out of the bunker spaces and properly cooled. Owing to those conditions fire again spontaneously broke out in the bunker coal on the voyage to San Nicolas and existed throughout the loading of the cargo at that port. The defendants said that the plaintiffs incurred the expenses and charges in question by reason of the matters aforesaid, alternatively, all the loss and damage in question and the matters alleged as general average were occasioned by the negligence of the plaintiffs in that they took the cargo on board the steamer and permitted her to sail from Santa Fe when they knew or ought to have known that the bunker coal on board was on fire, and/or was so highly heated that it was certain or likely to ignite spontaneously, shortly after the commencement of the loading or sailing, and without the plaintiffs taking any or any proper steps to have the vessel inspected or to insure that the bunker coal was in proper condition.

The plaintiffs by their reply claimed the benefit of the exceptions in the charterparty, the terms of which were incorporated in the bill of lading, which included a provision that the plaintiffs were not liable for loss or damage occasioned by fire from any cause whatsoever occurring or any latent defects in the hull, machinery or appurtenances or other accidents arising in the navigation of the steamer even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners not resulting from want of due diligence by the owners of the steamer. The plaintiffs said that the general average loss was due to causes within those exceptions and not resulting from any want of due diligence on the part of the owners of the steamer or on the part of the ship's husband or manager. The plaintiffs also said that if there was any unseaworthiness (which was wholly denied) at any material time the defendants knew of the alleged defective condition of the steamer at the time of loading and shipped the cargo with that knowledge.

*A. T. Miller K.C.* and *Stranger* for the plaintiffs. The shipowners are entitled in this case to recover a contribution in general average from the cargo owners in respect of the expenses incurred in putting out the fire caused by spontaneous combustion in the bunker coal. In *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (1), where coal took fire by spontaneous combustion without negligence on the part of any one and the water used in extinguishing the fire damaged the whole cargo of coal, it was held by the House of Lords that the owners of the coal were entitled to recover against the ship a contribution in general average. The duty on the part of the shipowner to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it: Carver's Carriage by Sea, § 18. Platt B., discussing the meaning of the seaworthiness of a vessel in *Gibson* v.

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(1) [1908] A. C. 431.

*Small* (1), said: "Its state, as to repairs, equipment, and crew, and in all other respects, should, at the time of its sailing on the voyage insured, be fit to encounter the ordinary perils of that particular voyage." Cockburn C.J. said in *Burges* v. *Wickham* (2) that "the term 'seaworthiness' is a relative and flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which the vessel is about to embark." Blackburn J., who was a member of the Court in that case, subsequently said in *Readhead* v. *Midland Ry. Co.* (3) that "the term 'seaworthy,' as applied to a ship, . . . . meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure." Although there is a warranty that at the time goods are put on board a vessel she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage, there is no continuing warranty after the goods are once on board that the ship shall continue fit: *McFadden* v. *Blue Star Line.* (4) Bunker fires by spontaneous combustion in vessels trading to the Plate are not uncommon, and the possibility of such fires in certain circumstances taking place, and that they cannot be avoided by diligence on the part of the shipowner or his crew, must be present to the minds of shippers of grain in the Plate, and they contract for the carriage of their grain with that in their minds, and therefore if such fires occur it cannot be regarded as unseaworthiness for which the shipowner is responsible. The plaintiffs also are entitled to rely upon the exception clause in the charterparty exempting the steamer from liability for loss or damage occasioned by fire from any cause whatsoever occurring or any latent defects in the hull, machinery or appurtenances. The plaintiffs also rely upon Rule D of the York–Antwerp Rules, 1924, which provides that "Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure ; but this shall not prejudice any remedies which may be open against that party for such fault."

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(1) (1853) 4 H. L. C. 353, 381.

(2) (1863) 33 L. J. (Q. B.) 17, 23; 3 B. & S. 669, 683.

(3) (1867) L. R. 2 Q. B. 412, 440.

(4) [1905] 1 K. B. 697, 704.

*Sir Robert Aske* for the defendants. A shipowner, under his implied warranty of seaworthiness, contracts not merely that he would do his best to make the ship fit, but that she should really be fit for the voyage: *Steel* v. *State Line Steamship Co.* (1), per Lord Blackburn; *The Glenfruin* (2), per Butt J. In the latter case a shaft was defective by reason of a latent defect and the ship was in consequence held to be unseaworthy. Bunker coal which is liable to spontaneous combustion by reason of its inherent qualities comes within the same principle. It was held in *McFadden* v. *Blue Star Line* (3) that the warranty, which is prima facie implied in a contract for the carriage of goods by sea, that the ship is fit for the reception of the cargo, is an absolute warranty. In order that a ship shall be seaworthy she must at the time of sailing, taking the whole circumstances together, be reasonably fit for accomplishing the service which the shipowners engaged to perform: see *The Schwan* (4), where a ship was held to be unseaworthy owing to a defect in a three-way cock which allowed the sea to run into the hold. A ship to be seaworthy must be fit to carry her cargo in ordinary circumstances and to encounter ordinary perils. Latent defects are at the risk of the shipowner unless he chooses to protect himself against liability by express exception. The dicta in *Burges* v. *Wickham* (5) are not relevant in a case where the point as to the fitness of the ship arises as between the shipowner and the cargo owner. They are only relevant as between a shipowner and an insurer. No qualification has ever been put upon the language of Lord Blackburn in *Steel* v. *State Line Steamship Co.* (1), where the duty on the shipowner that the ship shall be fit for its purpose of carrying goods is stated in absolute terms. In considering whether a ship is

(1) (1877) 3 App. Cas. 72, 86.
(2) (1885) 10 P. D. 103.
(3) [1905] 1 K. B. 697.
(4) [1909] A. C. 450.
(5) 33 L. J. (Q. B.) 17.

seaworthy at any particular point of time the question is answered by the actual experience of the ship, unless there has been some extraordinary occurrence such as an abnormal storm. As there were no circumstances in the present case which were not such as a ship would expect to encounter it follows from the fact that a fire broke out in the bunkers that the ship was not seaworthy at all material times. If a ship is unseaworthy the shipowners cannot recover a general average contribution for sacrifice due to their own fault and breach of contract: see *Schloss* v. *Heriot.* (1)

March 12. WRIGHT J. read the following judgment: This is a claim by shipowners against cargo owners for a general average contribution. The plaintiffs are the owners of a vessel called the *Alberto Fassini* of 4560 tons gross measurement, and the defendants are bill of lading holders, indorsees of the bill of lading from certain shippers, an allied company registered in the Argentine as Bunge & Borne Limitada. These shippers were charterers of the vessel under a charterparty dated August 11, 1927, under which the vessel then on her way from Cardiff with coals for Villa Constitucion or Rosario was to load at a port in the River Plate a cargo of grain, including maize, to deliver the same at Antwerp or Rotterdam at various freights depending on the port of loading. I need only refer to two clauses in the charterparty. One is clause 31, which provides that "average, if any, is payable according to York–Antwerp Rules, 1924." The other is the exception clause, clause 29: "The steamer shall not be liable for loss or damage occasioned by the act of God, by quarantine restrictions, by perils of the sea" and certain other perils "or any latent defects in hull, machinery or appurtenances, by collision, stranding or other accidents arising in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners or persons for whom they may be responsible (not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager)." That charter is the well known "Centrocon" form.

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(1) (1863) 14 C. B. (N. S.) 59.

The vessel bunkered at Rotterdam, which port she left on June 30 with 1618 tons of Westphalian coal, which was usual coal of good reputation and which was shipped in the usual mixture of screened and unscreened. I refer to the 1440 tons loaded at Rotterdam. There had been about 117 tons only on board before the bunker coal was loaded at Rotterdam which had been previously shipped, but of that quantity the bulk had been shipped shortly before at Hamburg, and in the events which happened I attach no importance to the small quantity which I think must have been used and disposed of before any matters material to this question arose. The cargo of coal which was shipped at Cardiff was destined to Villa Constitucion and the bunker coal which had been shipped in the large quantities that I have indicated was intended to take the vessel out to the Plate and bring her back to Europe or to the Islands. Such a practice of bunkering for the round voyage or for the principal part of the round voyage is common in this trade. The vessel sailed from Cardiff early in July. She arrived in the Plate or Buenos Ayres on August 12 or 13. Her bunker coal shipped at Rotterdam had been partly put in the No. 4 hold. That hold was required for cargo on the voyage back from the Plate, and at Buenos Ayres, or shortly after leaving that port, that coal was shifted from No. 4 hold to the bunkers.

The permanent bunkers apart from the hold used as a cross-bunker were identical in arrangement on each side with an immaterial exception. The lower bunkers went up to the 'tween decks from the tank top. They continued through the engine room space and the boiler space, being recessed in the boiler space. Above them were the upper bunkers on the bridge deck. There was a coal shoot to the bridge deck with a hatch opening out on the weather deck. There were three hatches on the bridge deck to the lower bunkers on each side and there was a shoot on each side for putting coal into the lower hold from the top deck. The hatches in the 'tween deck opening into the lower bunkers were, so far as I follow, generally left open, so that there was a communication between the coal above and the coal below. The total capacity of the bunkers was 530 tons in all, about 350 in the lower bunkers and about 280 tons in the upper bunkers.

The vessel when she was at Villa Constitucion and had discharged her cargo had about 706 tons of coal left, some of which I suppose must have been on deck or in some place other than in the permanent bunkers. She was kept waiting in the roads at Villa Constitucion exposed to the sun for fourteen days before she could get into her berth. The discharge of the coal was finished on September 7. She then proceeded to Santa Fe, where she arrived, as her first loading port, on September 10 and began to load. Six hundred tons of bunkers were then left on board. At that time she had been more than a month in the Plate, and the coals had been on the ship since about June 30 and had been carried through the tropics.

On the afternoon of September 14 fire was discovered in the upper bunkers on both sides. According to the log, which was put in evidence, several plates were hot, some paint was falling off on the upper portion on a line with the 'tween deck bunkers. Water was used to extinguish the fire but without effect. Next day water was again used and the coal was shifted from the bunker to the deck, a wood bulkhead at the after end between the bunkers and the deck having been removed. On the 16th water was still being poured into the bunkers and the fire was spreading forwards. On the 17th shifting of the coal was still going on and at 5 A.M. flames were coming out of No. 2 bunker hatch. Plenty of water, according to the log, was used, and the fire was localized. In the end the coal was all shifted from those bunkers except about five tons on each side. Probably about 200 tons were so shifted.

The master and the chief engineer gave evidence before the case was opened and were allowed to go away. They had left the ship for some time and the events in question occurred two and a half years or so before they gave evidence. I regret that their evidence was not more carefully tested by reference to the logs. The master says he saw fire, but he does not say at what time he saw it, nor does he explain its obstinacy or failure to yield to the application of water, which application went on for nearly three days. He speaks to two separate fires on the port side close to No. 2 hatch, that is about the middle lengthways of the bunker, one small, like a football, one rather larger near the inside wall, and he says in between he found coals which were not too hot to take into his hand. On the starboard a vein in a curved line about 1 foot thick was what he saw going forward from No. 2 hatch near the bottom of the bunker. He also says he felt the walls of the bunkers on each side and did not find them warm. The chief engineer adds nothing material, except that he says he used his thermometer after the first fire in the bunkers and found nothing wrong. I think the entries in the two logs indicate a much less localized and more extensive fire than would appear from the officers' evidence, which, however, may be quite true of what they observed at some time or times. They could not enter the bunkers until after water had been poured on the coal.

With about 200 tons of coal shovelled on deck the ship proceeded to San Nicolas to complete loading. On the way, on September 21, smoke and a strong gas smell were observed in the engine-room indicating a fire in the bunkers, the plates being heated. On that and the following two days water was poured into the bunkers to extinguish the fire and on the 24th they began shifting coal on deck. Loading had then been completed and the ship shifted to the roads. Discharging of the coal was difficult and slow because of the small hatches, and it could only be done by means of small baskets, and fumes and gases made the work difficult. By October 4 the coal was finally all discharged on deck. Water had been constantly used on the burning coal even to October 2, and on the starboard side the fire in the coal was still burning. By October 7 the coal had been all replaced in the bunkers and the ship sailed on October 8. I think these log entries made at the time give a much truer picture of the nature and extent of the fire than the officers' evidence, and I repeat my regret that I had no chance of putting them to the officers. The master says that on the starboard side the second fire was aft near the engine-room bulkhead, and the engineer says much the same, and as to the port side also puts the fire in the after corner. The master says he saw it in two or three places each side. The engineer says it was difficult to ascertain the exact seat of the fire, because as the coal was being shifted it collapsed to the bottom. The engineer's log under date October 7/8 says 533 tons of bunker coal were then on board, one-third not usable, showing heavy wastage by fire and also a heavy loss compared with the quantity of 585 tons on board before the fire. The impression made on me by the master and engineer is that while they did not seek to deceive the Court they simply did not remember. I infer and find that a large portion of the coal was on fire, probably still more was heated, and the fire was only extinguishable by the actual use of water for days and by the shifting of the coal on deck. If the fire had been merely in one, two or three isolated patches I think the water would have put it out much sooner.

Small bunker fires in the Plate are said to be not uncommon and are dealt with by the engineers and crew, who shovel out and flood a ton or so of burning coal. In three years recently 336 larger fires were reported to the Board of Trade, a very small proportion of the cargoes or bunkers handled in the world. It seems to me that a fire such as happened in this ship, requiring days to extinguish, must rank in the category of more important fires. Why they happen may not admit of precise explanation, nor may their happening in any particular case be easily foreseen, at least without very special investigation.

I have had the benefit of a distinguished expert on this subject, Dr. Lessing, who has developed in a most interesting manner the extreme difficulty in analyzing in any particular case the precise concurrence of circumstances which may lead to spontaneous combustion. Coal, he says, is always in process of oxidation, which is due to the effect of oxygen on the coal, but the heating process may be almost imperceptible and will certainly be harmless so long as the process is neutralized by the proper proportion of air to coal and you carry off the heat. But actual fires are very exceptional, even in cargoes or bunkers kept in confined holds for considerable periods. The material conditions are ventilation, proportion of dust, the sizes of the pieces of coal and the relative arrangement inter se of the pieces of different sizes. Where all these conditions co-operate in a manner most favourable to heating, then heating may ensue; but the arrangement of the pieces of coal may be constantly changing, for instance, while the bunkers are being worked or even by the motion of a ship pitching at sea. Whether or not a bunker fire occurs he says may be regarded as a matter of chance—namely, the due concurrence of the appropriate conditions at one moment. He seems to be of opinion that the fires in question were sudden in their origin and outbreak and did not show any prolonged previous heating. But this view seems to be based on accepting the evidence of the master that the first fires were of the size of a football and the other similar evidence I have referred to. He agrees, however, that once a fire is started there is a difficulty in finding where it started and he agrees that a diffused and not localized fire would indicate a degree of heating for some length of time. While refusing to dogmatize on the causes of fire in coal he says that the time that it has been confined in the compartment, the fact that it has come through the tropics, the fact that it has been in a compartment, one side of which is the ship's plates which have been exposed to the sun's rays in a hot climate, are all factors relevant for consideration. These are in fact all present in the coal which fired in this case. There is no evidence of what he regards as the vital element of temperature—namely, the sun temperatures, but only of shade temperatures to some of which Dr. Lessing seemed somewhat doubtfully to attach importance, and I find it difficult to agree with him.

On the whole, having regard to what I regard as the true extent of the fires (on the whole of the evidence), I think the true inference is that these fires which occurred in four different bunker spaces almost simultaneously in each pair of instances, upper and lower bunkers, were mainly governed by the common factors, the class of coal, the long voyage, the long stay at the Plate, especially in the roads at Villa Constitucion, all of which conditions had existed before loading either at Santa Fe or San Nicolas. In my judgment there was a defect in the coal at these dates of loading which did in fact result in fires, though perhaps in other similar cases no fires have occurred. I cannot regard the concurrences as a result of mere casual and sudden and sporadic conditions in coal otherwise free from any liability to spontaneous combustion. On this finding the ship was unfit to receive the cargo, and indeed, the voyage could not be proceeded with, as the claim for general average admits, until labour, time and money was expended to make her fit for the voyage. Prima facie, therefore, she was unseaworthy.

The practice of carrying bunker coals on the voyage out and back may always I think involve this risk of fire. Even though in many cases fire may not ensue the ship may be unseaworthy, just as a ship is unseaworthy with a latent defect in the crank-shaft, though the defect may not develop and operate until after several voyages and though the shipowner may neither know of nor be able to avert the danger. Such a case is *The Glenfruin.* (1) In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. Indeed, the practice is adopted I imagine from motives of economy. It probably is or ought to be present also to the merchant's mind, and Mr. Miller has contended that as it must be in the contemplation of both parties, shipowner and merchant, it cannot be regarded as unseaworthiness for which the shipowner is liable. No doubt in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2), shippers, whose coal, which had been shipped without negligence, had taken fire through its inherent nature, were held not to be debarred from claiming contribution in general average from the shipowners on the ground that the danger was equally within or outside the contemplation of both parties. But the distinction between that case and this is that in that case there was not a contract by the shipper containing a term comparable to the warranty of seaworthiness. The shipowner here warrants the fitness of his ship, and the more obvious the danger the more obvious seems the necessity to have the express exception if immunity is desired. But there is here in the contract no exception of unseaworthiness. The warranty of seaworthiness is absolute, not merely that they, the shipowners, should do their best to make the ship fit but that the ship should really be fit: per Lord Blackburn in *Steel* v. *The State Line Steamship Co.* (1) Mr. Miller has also contended that even if the warranty is absolute there are degrees of fitness so that such unfitness as I have here found to have existed in the coal is not a breach of the warranty because the factors involving danger in the coal are so shifting, inconstant and incalculable that the occurrence of the danger and of the heating before loading was no breach of the warranty. As I have already explained, I do not so regard the facts, but even so the same might be predicated of so uncertain an occurrence as the development of a latent defect. Mr. Miller further seeks to support his contention by a citation of *Burges* v. *Wickham* (2), where there was an insurance of a boat constructed for river navigation in India on the passage out from the builders in this country. In that case it was held that the standard of seaworthiness was relative to the nature of the adventure and hence was different from that applying to an ordinary sea-going vessel. That, however, was a case not of fitness to carry cargo, but to face the perils of the sea, and was a case of a known exceptional voyage and exceptional risk. The present is an ordinary commercial contract for the carriage of grain and the question is one of fitness to carry cargo. I cannot see any reason why the ordinary degree of fitness should not be required, including

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(1) 10 P. D. 103.

(2) [1908] A. C. 431.

(1) 3 App. Cas. 72, 86.
(2) 33 L. J. (Q. B.) 17.

the supply of safe bunkers. Mr. Miller also cited *McFadden* v. *Blue Star Line* (1), where the warranty was held to be broken by the defective packing of a valve chest which existed, unknown to the owner, though through some one's negligence, before the goods which were thereby damaged were loaded. In the present case if the point were material to consider the plaintiffs had the better means of surveying or investigating the condition of the coal, if they thought fit to do so, especially after the first fire, knowing, as they did, how long and in what climates the coal had been on board. But knowledge or ignorance is immaterial.

Mr. Miller relies on a passage in Carver on Carriage by Sea, § 18, which was quoted with approval by Channell J. in *McFadden* v. *Blue Star Line.* (2) A vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. . . . . If the defect existed, the question to be put is, Would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking." I think this is rather against Mr. Miller's contention, because I think if the owner had realized the actual condition of the coal before loading he would have dealt with it before loading or sending the ship to sea. Either he did not think of the matter at all or he took the risk.

The onus of establishing unseaworthiness is on the defendants, but I have held that the onus is satisfied, as I understand the facts, having regard to the way these two pairs of fires occurred, their extent and the history of the coals from shipment at Rotterdam. Sir Robert Aske has contended that the mere unexplained occurrence of these fires is in itself sufficient to establish unseaworthiness on the same principles as in the case of a ship which sinks soon after leaving port with no weather or other circumstances to account for her loss. In that case unseaworthiness may be presumed: *Pickup* v. *Thames and Mersey Marine Insurance*

(1) [1905] 1 K. B. 697.

(2) [1905] 1 K. B. 706.

*Co.* (1) In the present case nothing happened at or after loading the maize except what would normally be expected to occur. On this ground also I think that it is a reasonable presumption that it was the condition of the coal, and that alone, which caused the fires, thus arguing a defect or unfitness in the coal amounting to a breach of warranty.

I hold the ship was unseaworthy and, according to *Schloss* v. *Heriot* (2), the plaintiffs cannot recover the general average contribution for sacrifices due to their own fault and breach of contract. This is subject to two contentions of law raised by Mr. Miller: (1.) that the exception of latent defects, etc., justifies the claim, and (2.) that Rule D of the York–Antwerp Rules, 1924, provides that a claim in general average is not to be barred because it arose by default of the carrier. I think both these contentions are unsound for reasons which I have fully discussed in the judgment I have recently given in *Tempus Shipping Co.* v. *Louis Dreyfus & Co.* (3), and which I need not repeat.

There will be, therefore, judgment for the defendants with costs.

*Judgment for defendants.*

Solicitors for plaintiffs: *Stokes & Stokes.*

Solicitors for defendants: *Ince, Colt, Ince & Roscoe.*

(1) (1878) 3 Q. B. D. 594, 600.

(2) 14 C. B. (N. S.) 59.

(3) [1930] 1 K. B. 699.

R. F. S.

1930
*April* 2.

## THE KING *v.* EAST HAM BOROUGH COUNCIL.

### *Ex parte* HUNT.

*Education—Local Authority—"Scheme" for Performance of Powers and Duties—Reorganization of Schools—Communication of Proposals to Board of Education—Intention of Parties—Education Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 51), *ss.* 11, 15.

**In determining whether proposals put forward by a local education authority for the development and organization of education in its area and submitted to the Board of Education for approval constitute a "scheme" within s. 11 of the Education Act, 1921, so as to render necessary to its validity the performance by the authority of the conditions precedent to the submission of a scheme specified in s. 14, sub-s. 2, of the Act, the test to be applied is whether both the education authority and the Board of Education intend that which is put forward to be a "scheme" within s. 11 so as to make the education authority bound, under s. 15, sub-s. 1, to give effect to it. The magnitude and quality of the proposals are not material considerations.**

RULE NISI for a writ of certiorari.

On July 23, 1926, the respondents, the Council of the County Borough of East Ham, as local education authority, and in response to a circular previously issued by the Board of Education inviting local authorities to formulate "programmes of educational development," drew up a statement entitled "Scheme of Reorganisation of Schools and Education Programme, 1927–1930." On August 27, 1926, the secretary of the Education Committee of the Council sent copies of the document to the Board of Education with an estimate of proposed expenditure. On March 11, 1927, the Board of Education, by letter of that date, gave general approval to the "programme" of the committee. In preparing this document the committee did not consider that its contents constituted a "scheme" for the progressive development and comprehensive organization of education within s. 11 of the Education Act, 1921 (1), and they, therefore, before communicating with the Board, took no steps, as directed by s. 14, sub-s. 2, of the Act, to ascertain the views as to the proposals which were held by the parents of the children affected or other persons interested. The committee regarded the preparation of the proposals and their introduction merely as an exercise of the duty imposed on local education authorities by s. 17 of the Act to provide and maintain public elementary school accommodation. They submitted the proposals to the Board of Education, not for approval of a "scheme" within s. 15 of the Act, but merely because, as they involved expense, part of which would fall on the Board, the formal approval of the Board was necessary under reg. 5 (*b*) of the Regulations for Public Elementary Schools, dated July 12, 1926, ([1926] St. R. & O., No. 856) made by the Board under s. 118 of the Act, and also because the advice of the Board regarding the proposals from the national, as opposed to the local, standpoint was desired.

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(1) By the Education Act, 1921, s. 11: "With a view to the establishment of a national system of public education available for all persons capable of profiting thereby, it shall be the duty of the council of every county and county borough, so far as their powers extend, to contribute thereto by providing for the progressive development and comprehensive organisation of education in respect of their area, and with that object any such council from time to time may, and shall when

In pursuance of the proposals, alterations were made in two educational areas in the borough of East Ham. The new arrangements worked smoothly. In March, 1929, the Education Committee decided to extend the reorganization of schools to two further areas, and on April 4, 1929, the Board of Education gave general approval of their doing so.

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required by the Board of Education, submit to the Board schemes showing the mode in which their duties and powers under this Act . . . . are to be performed and exercised, whether separately or in co-operation with other authorities."

Sect. 12 : "A local education authority for elementary education from time to time may, and shall, when required by the Board of Education, submit to the Board schemes for the exercise of their powers as such authority."

Sect. 14, sub-s. 2 : "Before submitting schemes under this Part of this Act a local education authority shall consider any representations made to them by parents or other persons or bodies of persons interested, and shall adopt such measures to ascertain their views as they consider desirable, and the authority shall take such steps to give publicity to their proposals as they consider suitable, or as the Board of Education may require."

Sect. 15, sub-s. 1 : "The Board of Education may approve any scheme . . . . submitted to them under this Part of this Act by a local education authority, and thereupon it shall be the duty of the local education authority to give effect to the scheme."

The committee again did not regard themselves as acting under s. 11 of the Act, and, as before, took no measures under s. 14, before communicating with the Board of Education, to ascertain the views of parents and other interested persons. On June 25, 1929, however, they sent a circular letter to the parents of children affected by the reorganization explaining its object, and stating (inter alia) that "the scheme involves in some cases the transfer of children above the infants' stage from one school to another. . . . . It will be necessary, therefore, to transfer the junior boys and girls now attending Walton Road School to Fourth Avenue School or to Dersingham School." The committee also endeavoured to enlist the co-operation of parents by calling a public meeting.

The applicant, Joseph Richard Hunt, was the father of a boy above the infants' stage named Douglas Reginald Hunt, who had been accustomed to attend Walton Road School. On September 2, 1929, and on each subsequent school day for about nine weeks, Douglas Reginald Hunt attended at Walton Road School, but he was refused admission because of the reorganization. The applicant was informed that the boy should attend Fourth Avenue School. The applicant stated in his affidavit that the circular letter of June 25, 1929, was the first communication which he received with reference to the reorganization, that he did not know that any plans for reorganization were being framed, that he had no opportunity to make representations regarding the matter to the respondent Council in the manner contemplated by s. 14, sub-s. 2, of the Act, and that he would have made such representations, had he been able, as he objected to the reorganization, and was aggrieved by the "scheme" by which it was to be effected.

On November 28, 1929, a rule nisi was granted to the applicant calling on the respondent Council to show cause why a writ of certiorari should not issue to remove into the Court to be quashed "a certain scheme made by the said Council in March, 1929, for the reorganisation of certain schools in the County Borough of East Ham, and approved by the Board of Education on April 4, 1929." The ground on which the rule was granted was that "before submitting the said scheme to the Board of Education the said Council did not, as required by s. 14, sub-s. 2, of the Education Act, 1921, adopt any measures to ascertain the views of parents or take any steps to give publicity to their proposals."

In an affidavit, the Deputy Secretary of the Board of Education, who had been served with a copy of the rule, said that it had been the policy of the Board for some time past to encourage educational authorities to communicate with the Board with regard to (inter alia) the proposed reorganization of their schools, not to obtain approval of a statutory "scheme" under s. 15 of the Education Act, 1921, but that the Board might be kept informed of the steps which were being taken by the various education authorities, and that those authorities might have the benefit of any observations that were made by the Board. Proposals for reorganization so submitted were not treated as applications for statutory approval of a "scheme" within s. 15, nor was any signification of approval by the Board given or treated by the Board as the statutory approval of a "scheme." The reorganization carried out by the respondent Council was within the powers of the Council without any statutory approval of it by the Board, and the Board considered that the information about that reorganization had been given them entirely with a view to seeking their advice on it.

*Montgomery K.C.* and *G. D. Roberts* showing cause. The proposals put forward by the respondent Council in March, 1929, did not constitute a "scheme" within s. 11 of the Education Act, 1921. There is no definition of "scheme" in the Act, but, for proposals to amount to a "scheme," the education authority making them must deliberately act under s. 11, fulfil all the conditions laid down by s. 14 and intend to be legally bound to give effect to the "scheme" under s. 15, sub-s. 1, of the Act. All that has been done in the present case is to take a step in a programme of educational reorganization which was designed to cover a number of years. This rule ought, therefore, to be discharged.

*Sir William Jowitt A.-G.* and *Giveen* for the Board of Education. Under s. 17 of the Act a local education authority has a duty to maintain and keep efficient the public elementary schools within its district. Under that provision the reorganization that has taken place in the present case could have been effected without any submission of the proposals to the Board of Education, or their embodiment in any "scheme" within s. 11. A practice, however, has grown up (which the Board of Education regard as desirable and advantageous) by which local authorities submit proposals to the Board to obtain the advice of the Board and to ensure action in accordance with the policy of the Board. That is what was done here. The present facts do not show the existence of a scheme and it is submitted that the rule should be discharged.

*Comyns Carr K.C.* and *A. A. Thomas* in support of the rule. The argument that an education authority may do under its general powers exactly what it can do under a statutory scheme cannot be correct. If, by not calling its proposals a "scheme" an authority is to have the advantage of not being bound to fulfil statutory conditions or to carry its proposals into effect, evasions will result of the Act, the clear intention of which is that, where anything of the magnitude of the present reorganization is proposed, a "scheme" shall be formulated and published and the views of neighbouring education authorities and of parents and other interested persons shall be considered. Whether or not a proposal is a "scheme" is a matter of degree, and in the present case the boundary has clearly been crossed. Whether they intended to do so or not, the respondent Council did submit to the Board a "scheme" within s. 11 of the Act. They did not fulfil the conditions attaching to that course, and this rule, therefore, should be made absolute.

LORD HEWART C.J. The question that the Court has to decide in this case is whether the proposals put forward by the respondent Council in March, 1929, constitute a "scheme" within s. 11 of the Education Act, 1921. If it is such a "scheme," it is conceded that none of the steps indicated by s. 14, sub-s. 2, of the Act has been taken. It is, therefore, contended that the scheme, if scheme it be, was made without, or in excess of, jurisdiction to make it.

At one time there appeared to be a good deal to be said for the view that this was a "scheme" within the Act. Certainly the respondent Council could hardly have done more than they did to induce third persons to infer that the proposals which they put forward were a "scheme" within the Act. The word "scheme" occurs and recurs in the documents. I am, however, satisfied that this is not a "scheme" within the meaning of the statute. The history of the matter makes it clear that it was intended to be not a statutory scheme, but merely a particular instalment in a series, or programme, of plans or proposals which was contemplated some time before and was then expressly stated to be something that was not to bind the local authority, but was voluntarily communicated to the Board of Education by the respondent Council. Although the proposals were in fact approved by the Board, they never acquired, and were never intended to acquire, any binding legal effect.

There has been a good deal of argument about the true meaning of the word "scheme." There is no definition of the word in the statute. It has been suggested that, in determining whether or not a proposal is a "scheme," its magnitude or quality should be regarded. I find, however, nothing in the Act to justify the view that these criteria, or either of them, must be applied. The test seems rather to be whether it is the intention of the parties that that which is put forward as a "scheme" is to have binding legal effect so that, unless and until something contrary is sanctioned, it is the duty of the local education authority to give effect to it. In the present case it is obvious that the respondent Council did not intend that what they called a "scheme" should have any binding legal effect. As it takes two to make

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REX v. EAST HAM BOROUGH COUNCIL. HUNT, *Ex parte.*

Lord Hewart C.J.

a quarrel, so also, it would seem, under this statute, it takes two to make a scheme. Again and again in the communications between the respondent Council and the Board of Education, the Council's proposals are described by the Council as a "scheme," but the Board of Education will not have that word, and when they intimate their qualified approval of part of that which is proposed they significantly employ the word "proposal."

I think, therefore, that, whether one looks at the intention of the respondent Council or at the intention of the Board of Education, the proposals of the Council were never intended to be, and never became, a scheme within the meaning of Part II. of the Education Act, 1921. It is suggested that somewhat curious consequences may follow. That may be so. These sections in the Act of 1921 are obviously borrowed from the Education Act, 1918, when the Legislature was apparently contemplating the submission of schemes, perhaps of a rather grandiose character, by education authorities. These sections have, it would seem, been a dead letter. The provisions in the Act of 1921 which empower education authorities to submit schemes do not give an authority any power to do, under the protection of a scheme, anything which it could not have done without that protection. It appears to be optional on the part of a local education authority to do that which it contemplates either by way of a statutory scheme or otherwise. If a statutory scheme is contemplated, the conditions precedent have to be fulfilled, but, whether a statutory scheme be contemplated or not, the powers of the education authority appear to be identical in both cases.

It has been said that there may be hardship on the parents whose children are affected that such a reorganization of schools as is here contemplated should be carried out without regard to their wishes. When that complaint is made, however, one's mind naturally turns towards the alternative. Is the conclusion which is desired that the local authority cannot move hand or foot without fulfilling the conditions set out in s. 14, sub-s. 2? The effect of that argument would seem to be that an education authority could not with safety submit any proposal to the Board of Education for the skilled opinion of the Board without complying with the provisions of s. 14, sub-s. 2. If that were the law the practice would doubtless be that an education authority would do what it thought right without consulting the Board of Education. Regarding the matter fairly, although some curious results are involved in this legislation, I cannot come to the conclusion that this was, or was ever intended to be, a "scheme" within the meaning of this Act. In my opinion, therefore, the rule ought to be discharged.

Avory J. I am of the same opinion. This which is called a "scheme" appears to me, to quote the language of the letter of the Board of Education of April 4, 1929, to be merely a proposal for the reorganization of certain schools in the area of the respondent Council. Viewed in that light, it cannot possibly be contended that it was a "scheme" within the meaning of either s. 11 or s. 12 of the Education Act, 1921, especially when s. 12 is construed in the light of s. 11, which provides for the submission of schemes by local authorities "with a view to the establishment of a national system of public education." I see no reason to suppose that under s. 12 a local authority is intended to have any different object in view in preparing any so-called "scheme." The proposal in the present case does not comply with the principle contemplated by either section. Therefore, I agree that this rule should be discharged.

Branson J. I agree.

*Rule discharged.*

Solicitors showing cause: *Wilson & Blew.*
Solicitor for Board of Education: *Treasury Solicitor.*
Solicitors supporting rule: *Duthie, Hart & Duthie.*

G. F. L. B.

1930
*March* 20, 21;
*April* 10.

# LYNN *v.* BAMBER.

[1928. L. 2471.]

*Sale of Goods—Breach of Warranty—Fraudulent Representation—Concealment —Equitable Jurisdiction—Statute of Limitations.*

Since the Judicature Acts the equitable principle that active and fraudulent concealment on the part of the defendant constitutes a good reply to the Statute of Limitations is applicable even to pure common law causes of action; and even without the element of active concealment the Statute is no answer to a claim based on fraud.

Judgments of the Court of Appeal in *Armstrong* v. *Milburn* (1885) 54 L. T. 723 discussed and followed.

*Osgood* v. *Sunderland* (1914) 30 Times L. R. 530 not followed.

In 1921 the defendant sold the plaintiff plum trees warranted as "Purple Pershore." The plaintiff some years afterwards, finding that the trees were not "Purple Pershore," brought an action in 1928 claiming damages for breach of warranty. The defendant denied the breach and pleaded the Statute of Limitations. In his reply the plaintiff alleged fraudulent representation by the defendant and also fraudulent concealment of the breach:—

*Held*, that either of these pleas was relevant in answer to the Statute of Limitations.

*Bulli Coal Mining Co., Ld.* v. *Osborne* [1899] A. C. 351 followed.

*Held*, however, that the plaintiff upon the evidence had failed to establish the charge of fraud.

ACTION before McCardie J., sitting without a jury.

On December 3, 1921, the plaintiff bought from the defendant 240 young plum trees, sold and warranted as "Purple Pershore." The plaintiff, after some years, found that the trees were not "Purple Pershore," but "Coe's Late Red," being trees of an inferior quality. In December, 1928, he brought this action claiming damages for breach of warranty. The defendant in his defence denied the breach and contended that the claim was barred by the Statute of Limitations, 1623. In his reply the plaintiff alleged fraudulent representation and concealment by the defendant.

The action was tried at Cambridgeshire Assizes, but was adjourned to London for argument.

*Thorn Drury K.C.* and *Linton Thorp* for the plaintiff.

*J. P. Gorman* for the defendant.

*A. L. Stevenson* for a third party.

The arguments of counsel appear sufficiently from the judgment of the Court.

*Cur. adv. vult.*

April 10. McCARDIE J. read the following judgment: This is a most unusual case both as to facts and points of law. The plaintiff is a fruit grower in Norfolk. The defendant is a nurseryman in Cambridgeshire. On December 3, 1921, the defendant sold to the plaintiff, through an auctioneer, 240 young plum trees at the price of 3*s.* 6*d.* each. The trees were described and sold as "Purple Pershores." This species of plum tree was then somewhat new and was sought after by nurserymen and fruit growers. The plaintiff took possession of the purchased yearling plum trees, planted them, tended them and incurred considerable expense with respect to them. Some years later it was discovered by the plaintiff that the trees purchased from the defendant as "Purple Pershores" were not "Purple Pershores" at all, but a cheaper and inferior variety of plum tree known as "Coe's Late Red." Written complaint was made to the defendant by the plaintiff's solicitors on September 29, 1928.

The writ in this action was not issued till December 7, 1928. More than six years had therefore elapsed since the defendant committed his breach of contract on December 3, 1921. The statement of claim (delivered on February 25, 1929) is based on breach of warranty only. In his defence the defendant denied the breach of warranty and pleaded the Statute of Limitations, 1623. Upon the pleadings as they thus stood it is clear that the plaintiff's claim could not succeed; it would be statute barred. In his reply the plaintiff alleged in substance: (*a*) That the defendant fraudulently represented on December 3, 1921, that the trees sold were "Purple Pershores" whereby the plaintiff was induced to purchase them, and (*b*) that the defendant was at all material times aware that the plaintiff would not be able to discover that the said trees were not "Purple Pershore" trees until after the lapse of six years from the date of the said auction sale and that the defendant fraudulently concealed from the plaintiff the kind of trees sold by him to the plaintiff.

The action came before me for trial at the Cambridge Assizes on January 24, 1930, and was adjourned to London for argument. The breach of warranty has now been admitted by the defendant. The allegations of fraud are strenuously denied by him. The defendant has submitted as a preliminary point that in any event the contentions raised by the plaintiff's reply are no answer to the plea of the Statute of Limitations.

I will deal first with the questions of law. The numerous decisions bearing on the matter illustrate the lack of coherence in many branches of English case law. They demonstrate also the need for clear and definite formulation by the Courts so as to avoid obscurity, doubt and difficulty.

The breach of contract here occurred on December 3, 1921. As alleged in the statement of claim it was an ordinary breach of warranty within ss. 11 and 13 of the Sale of Goods Act, 1893. The cause of action therefore arose on December 3, 1921. This is clear from *Battley* v. *Faulkner* (1) and the many decisions cited in Darby and Bosanquet on the Statutes of Limitation, 2nd ed., p. 37. Prima facie, therefore, the cause of action was barred at the expiration of six years from December 3, 1921. The difficulties begin when the question of fraud is introduced. It is important to distinguish the common law decisions given before the Judicature Act, 1873, from the decisions given after that Act. I need not set out the well known provisions of ss. 23, 24 and 25 of the Act of 1873, nor need I set out ss. 36 and 44 of the Supreme Court of Judicature Act, 1925. The effect of those sections has been discussed in innumerable cases, and I will not embark upon them save so far as some of them may touch the present action. In substance the Judicature Acts provide that " where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail in all Courts whatsoever in England." In the common law Courts it had been held before the Judicature Act of 1873 that it was no answer to a plea of the Statute of Limitations that the plaintiff had

(1) (1820) 3 B. & Ald. 288.

been prevented by the fraud of the defendant from knowing of the cause of action until after the time of limitation had expired: *Imperial Gas Light & Coke Co.* v. *The London Gas Light Co.* (1) and *Hunter* v. *Gibbons.* (2) The latter decision was given in spite of the provisions of the Common Law Procedure Act, 1854, s. 85, as to "equitable answers."

The most important common law decision given after the passing of the Judicature Act of 1873 was *Gibbs* v. *Guild.* (3) It was there held by a majority of the Court of Appeal in an action to recover by way of damages money lost by the fraudulent representations of the defendant that a reply to the defendant's plea of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was good. It is to be noted that the decision of the majority of the Court of Appeal (Lord Coleridge C.J. and Brett L.J.) appears to have proceeded mainly on the ground that it was the concealment of the fraud which prevented the operation of the statute. It is also to be noted that Brett L.J. says (4): "This case, as it seems to me, is one in which before the Judicature Acts there would have been a concurrent remedy in the Courts both of law and equity." I will point out later the significance of that sentence. Finally it should be noted that *Gibbs* v. *Guild* (3) does not itself decide that the Statute of Limitations has no application to a claim of damages for fraudulent representation where there has been no concealment of it. The decision rested, I think, on the fraudulent concealment by the defendant of the fraud he had committed. How then does the matter stand when the defendant has been guilty of fraud in the original transaction but has not been guilty of fraudulent concealment of his fraud? What was the rule of equity in such a state of things? If the rule of equity was at variance with the common law rule then it must prevail by virtue of the Judicature Acts.

(1) (1854) 10 Ex. 39.

(2) (1856) 1 H. & N. 459; 26 L. J. (Ex.) 1.

(3) (1882) 9 Q. B. D. 59.

(4) 9 Q. B. D. 59, 70.

Before I deal with the decisions cited before me by counsel I wish to refer to two well known text-books on equity law, Seton on Judgments and Orders, 7th ed., p. 1385, and Daniell's Chancery Practice, 8th ed., p. 403, where the following passage occurs: "Although it is a rule in equity that no length of time will bar a fraud yet a transaction cannot be impeached on the ground of fraud where the fact of its having been committed has been within the knowledge of the party for many years. If, therefore, the claim states circumstances of fraud, and that the plaintiff did not become apprised of them till after the period limited by the Statute had expired, a plea of the Statute of Limitations will not prevail unless the defendant meets such statement by an averment negativing the fraud or the fact of the discovery within the time specified in the claim." Again I do not pause to analyse the decisions cited in support of that broad statement.

It is of interest here to mention the old equity case quoted by Mr. Thorn Drury K.C. in his argument for the plaintiff: *Worthington* v. *Wilkinson*. (1) The bill was brought there for discovery of a fraud and for relief. The defendant pleaded the Statute of Limitations. Lord Chancellor King said: "The plaintiff, after six years, shall have a discovery of that fraud which entitles him to his action which would otherwise be lost by the length of time. . . . . Where there is a plain fraud, the plaintiff may take advantage of it at law." The headnote to the case says: "A fraud is a bar to the Statute of Limitations at law." I may observe that Lord Chancellor King (who was a cousin of the philosopher John Locke) had for ten years occupied the position of Chief Justice of the Common Pleas. In *Mills* v. *Farmer* (2) Lord Eldon C.J. observed that Mosely's Reports "as a book possessed a very considerable degree of accuracy."

Of the cases discussed by counsel before me, *Armstrong* v. *Milburn* (3) was decided in 1885. There it was held by the Divisional Court (Mathew and Smith JJ.) in an action for negligence against a solicitor, who had pleaded the Statute

(1) (1729) Mosely's Rep. 244.
(2) (1815) 1 Mer. 55, 92.
(3) (1885–6) 54 L. T. 247, 723.

of Limitations, that a reply stating that, owing to the active and deliberate fraud of the defendant, the plaintiff did not discover and had not the means of discovering the defendant's negligence until within six years next before the action was brought, was no answer to the plea of the statute. It was conceded by the two learned judges that the authorities showed that where equitable relief was asked for before the Judicature Act and the defence was a plea of the Statute of Limitations it was a good answer that there had been a fraudulent concealment of the existence of that which had given the right to equitable relief. But they took the view that the doctrine of fraudulent concealment had no application to what is called a "pure" common law action for negligence, and they indicated that in *Gibbs* v. *Guild* (1) the case was one in which a bill in equity would "in the olden times" have lain and therefore that a replication of fraudulent concealment in such an action would be good. Such was the view of the Divisional Court, and counsel for the defendant here relied on that view as excluding from relevance in the present action the plea of fraudulent concealment. *Armstrong* v. *Milburn* (2), however, went to appeal, and the Court of Appeal held that there was no evidence of negligence and they also indicated that there was no evidence of fraudulent concealment. But I myself think it clear that the view of the Court of Appeal as to fraudulent concealment differed entirely from the view of the Divisional Court. Lord Esher M.R. said: "Even if there had been negligence the plaintiff would still fail, for the Statute of Limitations had run against her claim, and it is clear that she could have no answer to the defence of the statute unless fraudulent concealment on the part of the defendant were proved; but I cannot find any evidence of fraud or of any concealment at all. On this latter ground, therefore, as well as upon the ground that there is no evidence of negligence, I am of opinion that the defendant is entitled to judgment." Bowen and Fry L.JJ. expressed substantially the same views. The report of the appeal in the Times Law Reports (3) shows even clearer language

(1) 9 Q. B. D. 59.

(2) (1885–6) 54 L. T. 247, 723.

(3) 2 Times L. R. 615, 616.

by the Lords Justices as to the effect of fraudulent concealment in preventing the operation of the Statute of Limitations, even in a " pure " common law action. I am bound to prefer and I adopt the views of the Court of Appeal in preference to the views of the overruled Divisional Court. In *Osgood* v. *Sunderland* (1), before Bailhache J., the plaintiff sought damages against the defendant for breach of contract with respect to the installation of electric light at the plaintiff's house. The defective work was not discovered till eight years had passed. The defendant pleaded the Statute of Limitations, and the plaintiff in reply pleaded fraudulent concealment by the defendant. It was held by Bailhache J. that this reply was no answer to the defence of the Statute of Limitations. He founded himself entirely upon the decision of the Divisional Court in *Armstrong* v. *Milburn* (2), but indicated that he himself (if free) would have given a wider effect to the decision of the Court of Appeal in *Gibbs* v. *Guild.* (3) It will suffice to observe that in *Osgood's* case (1) Bailhache J. did not mention in his judgment that the decision of the Divisional Court in *Armstrong* v. *Milburn* (2) had been reversed by the Court of Appeal, nor was his attention, as I infer, clearly called to the fact that the views of the Court of Appeal as to fraudulent concealment were wholly inconsistent with those of the Divisional Court. I cannot therefore regard the opinion of Bailhache J. in *Osgood's* case (1) as binding me, deeply though I respect the views of that distinguished judge. I shall follow the views of the Court of Appeal in *Armstrong* v. *Milburn* (2), which I believe to represent the true effect of *Gibbs* v. *Guild.* (3) I shall hold that even in a " pure " common law action active and fraudulent concealment is now, since the Judicature Acts, a good reply to the Statute of Limitations. This, I think, is the view of the Court of Appeal, and it seems to me to be consistent with established equity principle.

But now there arises the further question : Suppose the defendant has been guilty of fraudulent misrepresentation,

(1) 30 Times L. R. 530.
(2) 54 L. T. 247, 723.
(3) 9 Q. B. D. 59.

but there has been no fraudulent concealment of it. How then does the case stand? In substance, this question really comes to this. Does the Statute of Limitations apply at all in such a case? I have already referred to the effect of *Gibbs* v. *Guild* (1) and of *Armstrong* v. *Milburn* (2) as to fraudulent concealment. The question now before me, however, requires the brief mention of other decisions. I have already indicated the broad view of the Chancery Courts with respect to the effect of fraud in preventing the operation of the Statute of Limitations. Nor should I forget the provisions of s. 26 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), with respect to concealed fraud when an action is brought for the recovery of any land or rent: see the decisions on that section referred to in Carson's Real Property Statutes, 3rd ed., p. 193, and the broad principles involved in those decisions. I may also refer to the effect of "concealed fraud" in, for example, partnership accounts: see Carson's Real Property Statutes, 3rd ed., p. 257.

The general rule in Chancery was that time only ran from discovery of the fraud: *Blair* v. *Bromley* (3) and Carson's Real Property Statutes, 3rd ed., p. 263. In numerous cases relief has been sought and obtained after the lapse of many years: *Armstrong* v. *Jackson* (4) and the Empire Digest, vol. xxxii., pp. 520 sqq. As Lord Westbury put it in *Rolfe* v. *Gregory* (5) the party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud. Once however that he knows of the fraud, he must not be guilty of undue delay.

But it may be said justly that the bulk of the cases I have just referred to were marked either by fiduciary relation or by special contractual ingredients. I must therefore consider the cases in which no such relations or ingredients existed. *Gibbs* v. *Guild* (supra) (1) was such a case, but there the Court of Appeal seems to have based their decision mainly, as I have said, on the ground of concealment of the fraud alleged, and

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(1) 9 Q. B. D. 59.

(2) 54 L. T. 247, 723.

(3) (1846) 5 Hare, 542.

(4) [1917] 2 K. B. 822, 830.

(5) (1865) 4 D. J. & S. 576, 579.

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they left undecided the point now before me. It may be urged, moreover, that in *Gibbs* v. *Guild* (1) the tort committed by the defendant was of such a nature as to give the plaintiff two alternative remedies — namely, either the claim for damages for fraudulent misrepresentation, or the equitable claim for rescission: per Brett L.J. (1) and *Goldrei, Foucard & Son* v. *Sinclair* (2) and *Molloy* v. *Mutual Reserve Life Insurance Co.* (3), per Romer L.J.

In *Bulli Coal Mining Co.* v. *Osborne* (4) the question now before me arose directly. There was no question in that case of fiduciary relation, nor any question of contract. The claim, in substance, was for trespass in that the defendant had furtively (that is, fraudulently) taken the plaintiffs' coal by wilful and secret underground appropriation. The wrong was committed in the years 1878 to 1880. Proceedings were not taken till 1893, when Osborne sought to prove in the winding up of the Bulli Company for the value of the coal taken. There could be no suggestion of fraudulent misrepresentation; nor was there any fraudulent concealment of the trespass. It was held by the Privy Council that the Statute of Limitations was no answer. The Court consisted of Lord Macnaghten, Lord Morris and Lord James of Hereford. I need only cite a few words from the advice of the Privy Council. They said (4): " The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection, is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot free at the end of a long period rather than the other? It would be something of a mockery for Courts of equity to denounce fraud as a 'secret thing' and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote." Such is the view of the Privy Council, after the fullest argument. It indicates that the decision of the Court of Appeal in *Gibbs* v. *Guild* (1) might have rested on the ground of the original fraud independently of the fraudulent concealment. I will not quote the various decisions cited in the opinion of the Privy Council. They are significant and weighty.

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(1) 9 Q. B. D. 59, 70.

(2) [1918] 1 K. B. 180.

(3) (1906) 94 L. T. 756, 761; 22 Times L. R. 525.

(4) [1899] A. C. 351, 363.

Now ought I to follow *Bulli's* case ? (2) It is not technically binding on me: *Dulieu* v. *White & Sons* (3) and *Venn* v. *Tedesco.* (4) But, on the other hand, Lindley L.J. has well observed that it is highly undesirable that there should be any conflict between the decisions of the Privy Council and those of the High Court or Courts of Appeal in this country : *The City of Chester.* (5) In my view, the decision of the Privy Council in *Bulli's* case (2) is one which should be followed. It accords with equity principle. It is supported by powerful opinon and decisions. It is agreeable to good sense and justice with respect to fraud. I therefore hold that it represents the existing law in these Courts, and in my opinion the principle it announces is just as applicable—nay, even more applicable—to the facts alleged in the present case as to the facts established in *Bulli's* case itself.

There are only three other decisions to which I need refer. *Barber* v. *Houston* (6) cannot, I think, after *Bulli's* case, be regarded as valid in the English Courts. With the utmost respect to the distinguished Irish judges, I do not think that they appreciated the full range of English equity decisions with respect to the effect of fraud in defeating the Statute of Limitations. *In re Astley and Tyldesley Coal Co.* (7), so far as it conflicts with *Bulli's* case (2), must now be regarded as without authority at the present day. *Oelkers* v. *Ellis* (8), if I may say so, is quite sound, not merely because of *Bulli's*

(1) 9 Q. B. D. 59.
(2) [1899] A. C. 351, 363.
(3) [1901] 2 K. B. 669.
(4) [1926] 2 K. B. 227.
(5) (1884) 9 P. D. 182, 207.
(6) (1885) 18 L. R. Ir. 475.
(7) (1899) 15 Times L. R. 154; 68 L. J. (Q. B.) 252.
(8) [1914] 2 K. B. 139.

case, (1) but because the result arrived at in the judgment could be supported by principles and decisions quite apart from that case. The like observation applies to *Legh* v. *Legh*. (2)

I therefore rule, in the present case, that in view of the defendant's plea of the Statute of Limitations it is relevant for the plaintiff to prove, if he can, either (*a*) that the defendant acted fraudulently in making his representation and warranty on December 3, 1921, or (*b*) that he fraudulently and actively concealed from the plaintiff his breach of warranty. [His Lordship then considered the whole of the evidence and found that the plaintiff had failed to establish the charge of fraud against the defendant. The allegation of fraudulent misrepresentation and fraudulent concealment therefore failed. He concluded : ] The result is that I rule in favour of the plaintiff on the points of law raised, but that on the facts I find in favour of the defendant.

*Judgment for defendant.*

Solicitors for plaintiff : *Withers & Co., for Metcalfe, Copeman & Pettefar, Wisbech.*

Solicitors for defendant : *Oldman, Cornwall & Co., for Ollard & Ollard, Wisbech.*

Solicitors for other parties : *Southwell & Dennis, Wisbech.*

(1) [1899] A. C. 351, 363.

(2) (1930) 169 L. T. Jo. 284.

F. P. F.

# LAWRENCE *v.* CASSEL.

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*April* 9.

[1929. L. 2697.]

## MANCHESTER DISTRICT REGISTRY.

*Vendor and Purchaser—Sale of Real Property—House in Course of Erection—Agreement to sell—Agreement to complete the House—Conveyance—Merger—Collateral Agreement.*

By an agreement in writing the defendant agreed to sell to the plaintiff a plot of land, part of a building estate, with a dwelling-house thereon in course of erection, and to complete the dwelling-house in accordance with plans of other houses, with fittings similar in all material particulars to those in other houses, erected on the estate. A deed of conveyance of the premises to the plaintiff was subsequently executed by the parties. The deed contained no reference to the building of the house or to any work done or to be done by the defendant in the way of completing it or otherwise.

The plaintiff brought an action for breach of the agreement, alleging that the defendant had thereby contracted that the builders' work should be carried out in a proper, efficient and workmanlike manner, and that the materials used should be fit and proper for the purpose, and averring that none of these terms or conditions had been fulfilled :—

*Held,* that the agreement to complete the house being collateral to the deed of conveyance was not merged therein and that, breaches of that agreement having been proved, the plaintiff was entitled to recover.

*Saunders* v. *Cockrill* (1902) 87 L. T. 30 approved.

Judgment of Swift J. affirmed.

APPEAL from the judgment of Swift J. in an action tried in Manchester before the learned judge without a jury.

By an agreement in writing dated January 20, 1928, and made between Adolph Cassel, the defendant, and Marcus Lawrence, the plaintiff, the defendant agreed to sell and the plaintiff to purchase a freehold plot of land as therein described and the dwelling-house thereon in course of erection by the defendant known as Thanet House, Stanley Road, Broughton Park, in consideration of the sum of 975*l.* and of a yearly rent charge of 9*l.* to be reserved to the defendant in the conveyance to the plaintiff. The purchase was to be completed on March 25, 1928, or within seven days after the local authority had certified that the house was fit for habitation.

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The agreement contained the following clauses: "4. The vendor will complete the said dwelling-house in accordance with the plans of other B type houses on the estate and the house will contain sanitary fittings similar in all material particulars to the houses of this type already erected on the estate (as seen in Bentley Road).

"5. Before completion the vendor will execute the following work." [The work related to painting the woodwork, providing points for electric light and meter and plugs for electric power and providing and fixing grates and mantel pieces.]

The property was sold subject to certain conditions of sale which are not material to this report.

On May 10, 1928, a conveyance of the said premises to the plaintiff in fee simple was executed by the defendant for the sum of 975*l.*, reserving to the defendant the yearly rent charge of 9*l.* mentioned above, to be paid as therein provided. The deed of conveyance contained no reference to the building of the house or to any work done or to be done by the defendant in the way of completing it or otherwise.

On May 15, 1928, the plaintiff went into possession of the house. Within a week he had to complain that the builder's work had been badly done and that water came through the walls and windows and damaged his carpets and furniture.

On June 14, 1929, the plaintiff brought an action for breach of the agreement of January 20, 1928. He alleged that the defendant had thereby contracted that the work should be carried out in a proper, efficient and workmanlike manner, and that the materials used should be fit and proper for the purpose and that none of these obligations or conditions had been fulfilled.

The defendant pleaded that there were no terms or conditions in the contract except those expressed therein; that before the contract was entered into the house was already completely constructed, except that no plastering or decoration had been done and that the fireplaces had not been fixed nor the fittings supplied. He further pleaded that on May 10, 1928, a deed of conveyance had been made and executed by and between the parties and that the contract of sale was merged in the deed, and that the terms of the contract not repeated in the deed were no longer enforceable.

Swift J. gave judgment for the plaintiff for 150*l.* damages. The defendant appealed.

*Cyril Atkinson K.C.* and *Lustgarten* for the appellant. The respondent's complaint was that the house was not properly built, in particular that the mortar used was very defective. He relies on an alleged contract to build the house in a proper and workmanlike manner and that the building materials should be fit and proper. There is no express term to that effect in the agreement of January 20. The respondent is therefore driven to rely upon an implied term in that agreement. But this he cannot do, because the agreement with all its terms express and implied was merged in the conveyance of May 10. "In general, where parties enter into a preliminary contract, which is afterwards to be carried out by a deed, the contract becomes extinguished in the deed when it is executed, and can no longer be looked at for any purpose": Dart on Vendor and Purchaser, 8th ed. (1929), p. 683; *Leggott* v. *Barrett* (1); *Joliffe* v. *Baker*. (2) "If there was a stipulation containing a warranty as to the particular condition of any part of the premises, or anything in fact bearing upon the condition of the premises, and if that was intended to be carried on and continued, the most natural place to find it would be in the conveyance itself. There is no reason why, if it were the intention of the parties that it should survive, it should not find its place in the conveyance": *Greswolde-Williams* v. *Barneby* (3) per Wills J. There is an exception to this rule in the case of a stipulation for compensation for errors in describing the parcels of the land conveyed: *Bos* v. *Helsham* (4); *Palmer* v. *Johnson* (5); or in case of an agreement collateral to the conveyance: *Saunders* v. *Cockrill* (6); *De Lassalle* v. *Guildford*. (7) But to say that

(1) (1880) 15 Ch. D. 306, 309.

(2) (1883) 11 Q. B. D. 255, 267.

(3) (1900) 83 L. T. 708, 711.

(4) (1866) L. R. 2 Ex. 72.

(5) (1884) 13 Q. B. D. 351.

(6) 87 L. T. 30.

(7) [1901] 2 K. B. 215.

an agreement that a dwelling-house shall be built in a workmanlike manner is collateral to a conveyance of the house in course of erection and wanted for immediate occupation is to use the word "collateral" without any regard to its ordinary meaning.

Secondly, the agreement of January 20, 1928, was an agreement for the sale of a house already complete except for the painting of the woodwork and other details specified in clause 5. The agreement to complete the said dwelling-house related to those details and not to any work that had been done at the date of the agreement.

*Eastham K.C.* and *Butlin* for the respondent. The agreement of January 20, 1928, imposed two obligations upon the appellant, (1.) to complete the house, that is to complete it in a workmanlike manner and with proper materials, and (2.) to convey the house to the respondent. He has performed the second obligation, but he has not performed the first. He has pleaded that the house was completed, except as to certain particulars, but the main issue has been found against him. How does performance of the second obligation operate to discharge the first? It is neither a release nor an accord and satisfaction of the obligation to complete the house in a workmanlike manner. If there had been a covenant in the conveyance relating to the manner of building the house, then indeed the terms express or implied in the agreement would have been merged in the deed. If *Leggott* v. *Barrett* (1) purports to decide more than that it ought not to be followed. *Joliffe* v. *Baker* (2) is not in point, for there the purchaser had agreed to waive all objections and requisitions after a certain date, which had passed before he discovered the inaccuracy of the description of the parcels, an inaccuracy which was due to an innocent mistake of the vendor. The present case is covered by *Saunders* v. *Cockrill* (3), which was rightly decided and ought to be followed. It is well settled that an agreement collateral to the conveyance of the property is not merged in the deed of conveyance. The

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(1) 15 Ch. D. 306.

(2) (1883) 11 Q. B. D. 255, 267.

(3) 87 L. T. 30.

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word "collateral" may require definition. An agreement is not excluded from the category of collateral agreements merely because it relates to the transaction of sale and purchase of real property. A clause in an agreement of sale that errors and misdescriptions shall not invalidate the sale, but shall be the subject of compensation, affects the sale, but is still a collateral agreement which is not merged in the conveyance: *Palmer* v. *Johnson.* (1) Similarly an agreement to complete in a workmanlike manner and with proper materials a house which is to be sold is, in this sense, collateral to the sale and actual conveyance of the property.

With regard to the second point raised by the appellant, that the agreement to complete refers only to the matters mentioned in clause 5, this construction was not suggested in the Court below. The case was conducted by both sides on the footing that the agreement referred to the house as a whole.

*Cyril Atkinson K.C.* in reply.

SCRUTTON L.J. This appeal comes before the Court in a very unsatisfactory way. We have very scanty information of what the learned judge said in his judgment. There is no shorthand note, although we always allow the cost of a shorthand note of the judgment under appeal, and there is no note, as there ought to be, by junior counsel on either side. It is not fitting that an appellant should come to this Court saying "The judgment is wrong, but I cannot say exactly on what grounds the learned judge decided."

Giving the fullest attention to the careful statements according to their recollection by Mr. Lustgarten and Mr. Eastham, it seems to me that the substantial point which the appellant seeks to establish is this: He says, it is true there was a contract in writing under which a house in course of erection was to be sold by the appellant to the respondent; the contract contained certain express terms as to how the house should be completed, but after the contract had been signed the respondent took a conveyance of the house and the plot of land on which it stood, and that conveyance contained none of the express terms mentioned above; consequently the contract with its express terms is merged in the conveyance, and as the respondent is claiming damages for the imperfect performance of the terms expressed in the contract but not expressed in the conveyance his claim is without foundation. That argument proceeds on a wrong view of the authorities. This appears quite clearly from the judgment of Fry L.J. in *Palmer* v. *Johnson.* (1) In that case there was in a preliminary contract for the sale of real property a term that if any error, misstatement, or omission in the particulars of sale should be discovered it should not annul the sale, but compensation should be allowed by the vendor or purchaser as the case might require. There was no such term in the conveyance. Fry L.J. after saying that when a preliminary contract is afterwards reduced into a deed, and there is any difference between them, the mere written contract is entirely governed by the deed, went on: " But that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed, in this case, was intended to cover only a portion of the ground covered by the contract of purchase." Another instance of the same principle is to be found in *Saunders* v. *Cockrill.* (2) The contract in that case provided that the plaintiff should buy a house in the course of erection by the defendant; the defendant was to fix air bricks according to the by-laws of the borough and to supply and fix stoves, drains, and fixtures and in all other respects to complete the house in a proper and workmanlike manner. A deed of conveyance of the house was subsequently executed which said nothing about these matters. The plaintiff sued for breaches of the contract. The Divisional Court held that he was entitled to succeed, although the deed contained nothing about the stipulation he was suing on, and they based their decision on the ground laid down by Fry L.J. in the former case; that the contract

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(1) 13 Q. B. D. 351.

(1) 13 Q. B. D. 351, 359.

(2) 87 L. T. 30.

to do the work was collateral to the contract for the sale of the house in the course of erection, and, being collateral to that contract, had no place in the deed of conveyance and was not merged in it, but could be sued upon if it was not performed. Thus the main purpose of this appeal fails because the contract contained a stipulation which was collateral to the conveyance and was therefore not merged on the execution of the deed of conveyance which said nothing about the subject of the stipulation.

I agree that it might require very careful consideration whether the agreement to complete the house referred exclusively to work to be done subsequently, accepting what had already been done as executed according to the contract, or whether it included the whole of the work to be done on the house—that which purported to be completed as well as that which was plainly unfinished. There is a good deal to be said for the view that a contract to complete a house is not performed by making a house full of defects some of which subsequently appear in consequence of work badly done before the contract and some of which are due to bad work done after the contract. But on this question I say nothing, because no point was made at the trial that clause 4 of the contract only related to work which was to be done under clause 5, after the date of the contract and before completion of the sale, but did not apply to work done before the contract. In these circumstances I do not think we ought to interfere even if we were of opinion that the contract had no relation to work which had been done before it was entered into, a question which, as I say, I am not going to decide. The appellant's main point having failed, the appeal must be dismissed.

GREER L.J. I agree so fully with the judgment which has just been delivered that I cannot usefully add anything.

SLESSER L.J. On the first point I entirely agree and have nothing to add. On the second point, that the agreement was mainly to complete work remaining unexecuted on

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January 20, I agree that this point was not raised at the trial, and would add that in my opinion it is not to be found in the pleadings either.

*Appeal dismissed.*

Solicitors for appellant: *Brooks, Hulme & Ruddin, Manchester.*

Solicitors for respondent: *Charles Howard & Co., Manchester.*

W. H. G.

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*April* 11.

## BANK OF RUSSIAN TRADE, LIMITED v. BRITISH SCREEN PRODUCTIONS, LIMITED.

[1929. B. 4543.]
[1929. B. 5198.]

*Practice—Interrogatories—Company answering by Secretary—Knowledge, Information and Belief—Answer as to Knowledge only—Duty to enquire —Insufficient Answer.*

In an action by indorsees of a number of bills of exchange alleged to have been drawn by a German company, accepted by the defendants, an English company, indorsed to the plaintiffs and dishonoured, the defendants among other pleas denied the drawing and indorsement of the bills. The plaintiffs administered to the defendants the following, among other, interrogatories: (1.) "Were not all or some or one and which of the said bills drawn by" the German company "or their agent or agents duly authorized in that behalf?" (2.) "Were not all or some or one and which of the said bills indorsed by" the German company "or their agent or agents duly authorized in that behalf to the order of" certain named indorsees? (3.) "Was not" the German company "at all material times a corporation duly incorporated under the laws of the German Republic?" Appended to the interrogatories was a direction that the defendants should answer them by their secretary to the best of his knowledge, information and belief. To each of them the secretary answered simply: "I say that I do not know":—

*Held*, that the answer was insufficient, inasmuch as other officers of the defendants might in the course of their duties have acquired the requisite information; that if they had, this would have been the information of the company, and that it did not appear from the answer whether the secretary had made any enquiries to ascertain whether such information was available.

APPEAL from an order of Talbot J. reversing an order of Master Whately who had ordered the defendants to make a further answer to interrogatories.

The plaintiffs had brought two actions, which were afterwards consolidated, as indorsees of two sets of bills of exchange drawn by the Deutsch Russische Film Allianz Aktiengesellschaft "Derussa" (hereafter called the Derussa Company), accepted by the defendants and dishonoured. The first set consisted of seven bills each for 300*l.*; the second set consisted of thirty-eight bills each for 300*l.*

The defendants did not admit the drawing, acceptance, making or indorsement of any of the instruments sued on, or that they were presented for payment or dishonoured, or that the plaintiffs were indorsees or holders in due course of any of the instruments. Further, with regard to twenty-nine of the bills said to be dated August 5, 1929, the defendants pleaded that no consideration was given by any of the parties, but that they were accepted by the defendants for the accommodation of the Derussa Company without any consideration for the acceptance; and that on July 29, 1929, one Pearson, who was the defendants' managing director in London, acting on behalf of the defendants, handed these bills or blank acceptances, since filled up as bills, to one Pop, a director of the Derussa Company, for the purpose of getting them discounted and redeeming certain films that were in pledge; that the said Pop in conjunction with one Zörer on their own account or as agents of the Derussa Company in fraud of the defendants procured the indorsement of these bills to the Russian Soviet Trade Delegation in Germany of which the said Zörer was an official; and that the plaintiffs took these bills when they were overdue without consideration and with notice of the fraud and of the defective title of the Derussa Company.

With regard to the remaining sixteen bills the defendants pleaded that on August 20, 1929, they had been sent by the said Pearson on behalf of the defendants to the said Pop to get them discounted and to have the proceeds remitted to England; that on August 28, 1929, one C. R. Maude acting for the defendants took back these bills, which had not then been discounted, from the said Pop, and that on September 3, 1929, the Russian Soviet Trade Delegation in Germany obtained the bills from C. R. Maude by fraud and without consideration, and that the plaintiffs took these bills when they were overdue without consideration and with notice of the fraud.

An order having been made in chambers that the plaintiffs should be at liberty to deliver to the defendants interrogatories in writing as initialed by the Master, the following interrogatories, among others, were administered by the plaintiffs for the examination of the defendants :—

" 2. Were not all or some or one and which of the said bills drawn by " the Derussa Company " or their agent or agents duly authorized in that behalf ?

" 3. Were not all or some or one and which of the said bills endorsed by the said " Derussa Company " or their agent or agents duly authorized in that behalf to the order of " the Russian Soviet Trade Delegation in Germany ?

" 5. Was not " the Derussa Company " at all material times a corporation duly incorporated under the laws of the German Republic ? "

At the end of the interrogatories was the following direction : " The defendants are required to answer all the above interrogatories by their Secretary or other their proper officer to the best of his knowledge, information and belief."

In answer to these interrogatories Henry Francis Tierney, the secretary to the defendants, made oath and said : " In answer to the second interrogatory, I say that I do not know." He made exactly the same answer—" I say that I do not know "—to the third and fifth interrogatories.

On the plaintiffs' application the Master ordered a further answer.

On appeal the learned judge in chambers reversed the order of the Master.

The plaintiffs appealed.

*Harold Murphy* for the appellants. The answer is insufficient in that it is really the answer of the secretary and not that of the Company. The Company have been ordered to answer to the best of their information and belief. Their information is the information of their officers acquired in the course of their duties. If they are ordered to answer by their secretary it is not enough for the secretary to say he does not know; he must go further and say he has made enquiries of the other officers, who may know more than he does, and he must state either that they have no information or else that from enquiries made he is informed of the facts which they have communicated and that he believes them: *M'Intosh* v. *Great Western Rly. Co.* (1); *Douglas* v. *Morning Post, Ld.* (2)

[SLESSER L.J. referred to *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.* (3)]

*Valentine Holmes* for the respondents. A particular officer is selected, generally by the party interrogating, as the spokesman of a company because he is the officer best informed on the matter on which evidence is wanted. When the officer selected says that he has no knowledge on the matter, that is a good answer, unless there is something to show that there is information reasonably obtainable: *Bolckow, Vaughan & Co.* v. *Fisher* (4); *Rasbotham* v. *Shropshire Union Railways and Canal Co.* (5) The respondents' secretary was well aware that he was answering not for himself but for them and consequently that it would be his duty to obtain and impart information which was within the knowledge of other officers of the respondents acquired by them in the course of their duty in that respect. He is not bound to go further than that in order to obtain information: *Alliott* v. *Smith.* (6) It is not to be assumed that, there being available information, he deliberately abstained from acquiring it or refuses to disclose it. It is to be presumed, until there is ground for thinking otherwise, that he made all reasonable enquiries

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(1) (1851) 4 De G. & Sm. 544.

(2) (1923) 39 Times L. R. 402.

(3) [1900] 2 Ch. 1.

(4) (1882) 10 Q. B. D. 161.

(5) (1883) 24 Ch. D. 110.

(6) [1895] 2 Ch. 111.

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of the other officers and that they had nothing further to supply.

*Harold Murphy* in reply.

GREER L.J. This is an appeal from an order of Talbot J., who decided that the respondents' answer to interrogatories was sufficient, reversing the order of the Master who was of the contrary opinion. The action was brought by the appellants, the Bank of Russian Trade, Ld., against the respondents on a number of acceptances of which the Derussa Company are said to have been the drawers. These documents appear to be signed by two persons purporting to sign on behalf of the Derussa Company. In order to succeed the appellants have to show that the documents were signed by those persons and signed by them not as mere strangers but as agents in the employ of the Derussa Company, and also to show that in so doing they were acting within the scope of their authority. All these steps, which must be proved by the appellants, are denied by the respondents. In order to prove them the appellants administered these interrogatories. The defence is that the insertion of the names of the Derussa Company and the Russian Soviet Trade Delegation was in each case a fraud, because the documents which were sent to these so called agents for one purpose were used by them for another for which they were not intended, and that the parties who took the bills had knowledge of the facts which invalidated them. These are matters which must be tried in the action. The interrogatories in effect ask: "Were these documents in fact signed by persons who were agents of the company, and had those persons the authority of the company to sign them?" Those are proper interrogatories, approved by the Master, and they must be properly answered in each of their branches.

It is well established that a secretary of a company answering as the mouthpiece of the company does not always answer sufficiently by merely searching his own mind and saying there is nothing in his mind which enables him to answer. In *Douglas* v. *Morning Post, Ld.* (1), Scrutton L.J.

(1) 39 Times L. R. 402.

said that "Under the English procedure if a party had means of knowledge he must use them to the best of his knowledge, information and belief. In his view it was sufficient to say in reply to an interrogatory Yes or No, but if the person answering departed from this, and put in one of the above elements of knowledge, information, and belief he ought to put in all. Merely to affirm that a party had belief was not sufficient." It follows that merely for the deponent to say that he has no knowledge is equally insufficient. That appears from *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.* (1), where it was held that the officer of a company, answering interrogatories on their behalf, is only bound to answer as to his knowledge acquired in the course of his employment by the company and as to the result of enquiries made by him of the other officers and agents of the company with regard to their knowledge acquired in the same way; but that he is not bound to answer as to his own knowledge acquired accidentally or in some other capacity, nor is he bound to make inquiries of the other officers or agents of the company as to their knowledge acquired otherwise than in the course of their agency. That involves two positions: (1.) that the answer of a company by their secretary is not merely the answer of the secretary according to his own personal knowledge, but is the answer of the company who must answer by their officers; (2.) that the officer answering must answer after obtaining the necessary information or trying to obtain it from other officers of the company whose knowledge is the knowledge of the company; and (3.) that a company answering by their secretary is not bound to give to the other party information which he or other officers of the company have acquired, not in the course of their business as officers or agents of the company, but which they may have derived from some extraneous source. This was acted on in *Alliott* v. *Smith.* (2) There the defendant, who was an executor, was asked whether his testator had twenty years before the action paid certain sums to certain bankers

(1) [1900] 2 Ch. 1.

(2) [1895] 2 Ch. 111.

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or solicitors; he had no knowledge either personally or through his servants or agents of the alleged payments, and he answered that he did not know, and was unable to say, whether the sums had been paid to the bankers or solicitors as alleged. Objection to this answer was taken upon the ground that by enquiring of the bankers or solicitors the defendant could have acquired the information; but Kekewich J. held that the plaintiffs were not entitled to any further answer. That is an illustration of the third position above stated. Neither an individual nor a company is bound to institute a roving enquiry among all available sources of information for the purpose of enabling the other party to make out a case; but they are bound to answer according to their knowledge, and according to information and belief acquired or formed from personal knowledge or from information obtainable from others who are servants or agents of the party answering and have acquired the information in that capacity. Therefore in my opinion it is not sufficient for the secretary of the respondents to say in answer to these interrogatories, "I do not know." He ought to have gone on to say that he had no information; and I think he ought further to have said that he had made enquiries of other officers and agents of the respondents and that, having made those enquiries, he had no information enabling him to answer further. The appeal must be allowed.

Slesser L.J. I am of the same opinion, and only wish to add that these interrogatories, which have been approved by a Master of the Supreme Court, end with this instruction: "The defendants are required to answer all the above interrogatories by their secretary or other their proper officer to the best of his knowledge, information and belief." The person interrogated is not the secretary or other proper officer, but is the Company, who can only answer through some officer. And to a representative answering for a company the words of Cotton L.J. in *Southwark Water Co.* v. *Quick* (1) are appropriate: "The directors of a company, in answering

(1) (1878) 3 Q. B. D. 315, 321.

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interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts." To answer according to information is not the same thing as to answer according to knowledge; the former phrase is not a mere repetition of the latter, but goes further and covers information which is not within the knowledge of the person answering but must come from elsewhere. It includes information obtainable from other servants of a company. When the person making answer simply states that he does not know, he leaves the Court and the other party in doubt whether he has or has not availed himself of the information properly at his disposal; it is quite consistent with his answer that he has confined himself to his own personal knowledge, which would make the answer his answer and not that of the Company. The interrogatories therefore are not properly answered, and the appeal must be allowed.

*Appeal allowed.*

Solicitors for appellants: *Wynne-Baxter & Keeble.*
Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

W. H. G.

K. B. D.
1929
*Nov.* 5.
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*Jan.* 14.
C. A.
*March* 25,
26, 27;
*April* 10.

# THE KING *v.* MINISTER OF HEALTH.

## *Ex parte* YAFFE.

*Local Government—Unhealthy Area—Improvement Scheme—Scheme presented to Minister for Confirmation—Scheme as presented improper One—Order of Minister confirming Scheme with Modifications—Scheme as modified in accordance with Act—Validity of Order of Minister—Certiorari—Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *Part II., ss.* 35, 36, 38, 39, 40.

The Housing Act, 1925, by s. 35, empowers local authorities to make schemes for the improvement of unhealthy areas within their district.

By s. 40, sub-s. 1: A local authority which has prepared an improvement scheme shall, after complying with certain conditions, "present a petition to the Minister praying that an Order may be made confirming such scheme."

Sub-s. 3: "The Minister after considering the petition may cause a local inquiry to be held, and . . . . may by Order confirm the scheme with or without . . . . conditions or modifications. . . . ."

Sub-s. 5: "The Order of the Minister when made shall have effect as if enacted in this Act."

A local authority purported to make an improvement scheme under s. 35 of the Housing Act, 1925, in respect of an unhealthy area within their district, and, having complied with the provisions of the Act with respect to the publication of an advertisement and the service of notices, presented a petition to the Minister of Health, under s. 40, sub-s. 1, of the Act, praying that an Order might be made confirming such scheme. The Minister caused a local inquiry to be held, but at that inquiry no proper plans showing the proposed lay out of the area were produced, nor were such plans submitted to the Minister when he was asked to confirm the scheme. Eventually the Minister made an Order under s. 40, sub-s. 3, of the Act, confirming the scheme with modifications. The scheme as submitted to the Minister for confirmation was not a valid improvement scheme, having regard to the decision in *Rex* v. *Minister of Health. Ex parte Davis* [1929] 1 K. B. 619, because it contained a clause giving the local authority power to use or dispose of any land compulsorily acquired under the scheme, and not used for the erection of working class dwellings, in any way that the local authority might think fit. The owner of two houses which it was proposed to acquire compulsorily under the scheme on account of their sanitary condition obtained a rule nisi for a writ of certiorari to quash the Order of the Minister confirming the scheme on the ground that the Minister had no jurisdiction to make the Order, as the scheme which the Order purported to confirm was not an improvement scheme within the meaning of the Housing Act, 1925:—

*Held*, by the Divisional Court (Lord Hewart C.J. and Talbot J.; Swift J. dissenting), that the rule must be discharged on the ground:—

Per Lord Hewart C.J. That inasmuch as the scheme as confirmed by the Minister had been so modified by him that if it had been originally drawn in that form it would not have contravened the provisions of the Act, s. 40, sub-s. 5, of the Housing Act of 1925, this was sufficient to cover the irregularities which preceded the making of the Order of the Minister which purported to be made, and was in good faith intended to be made, in pursuance of the Act.

Per Talbot J. (1.) That as soon as an Order was made by the Minister confirming an improvement scheme it had statutory authority by virtue of sub-s. 5 of s. 40 of the Act of 1925, and no question of ultra vires could be raised in a Court of law. If an Order was bona fide intended and purported to be made by the Minister under s. 40, it came within the protection of sub-s. 5, whether or not there was originally jurisdiction to make it; (2.) that there was no ground for quashing an Order confirming a scheme which as confirmed was in accordance with the Act, merely because the Minister might have been prevented from confirming the scheme originally submitted to him.

Swift J. held that the scheme presented to the Minister for confirmation must be a proper scheme under the Act such as could be confirmed without modification, and until a local authority had prepared such a scheme there was nothing for the Minister to consider. In the present case no valid Order was made by the Minister under s. 40, sub-s. 3, because no proper scheme had been submitted by the local authority to him for confirmation, and therefore sub-s. 5 of s. 40 did not operate, because that sub-section did not operate till sub-s. 3 had been complied with. Further the question whether or not such an Order had been made by the Minister was one of fact, and the Court was not bound to accept the statement of the Minister that he had made such an Order.

*Held*, by the Court of Appeal (reversing the decision of the Divisional Court), that an Order made by the Minister under s. 40, sub-s. 3, of the Housing Act, 1925, in respect of which the statutory conditions, under which alone it can be made, have not been complied with, is not an Order which, when made, can, by reason of s. 40, sub-s. 5, of the Act, have statutory effect; that as the Order in question was made without the statutory conditions having been complied with it was ultra vires; and therefore that a writ of certiorari should issue for the purpose of quashing it.

*Institute of Patent Agents* v. *Lockwood* [1894] A. C. 347 and *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners* 1915 S. C. 504 distinguished.

RULE NISI calling upon the Minister of Health to show cause why a writ of certiorari should not issue to remove into the High Court an Order made by him dated November 23, 1928, purporting to confirm a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme, 1928, as modified and set out in the Order.

The rule was obtained on the ground that the Minister had no jurisdiction to make the Order, because the scheme submitted to the Minister for his approval was not an improvement scheme within the meaning of Part II. of the Housing Act, 1925. (1)

On January 18, 1928, the Corporation of Liverpool received a representation from the medical officer for the city recommending an improvement scheme dealing with an area defined in a schedule appended. On January 19 the Housing Committee of the Corporation resolved to recommend the Council to declare the area an unhealthy area and to instruct

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(1) Housing Act, 1925, Part II., s. 35, sub-s. 1: "Where an official representation is made to a local authority [by the medical officer of health] as respects any area in the district of the authority either—(*a*) that any houses, courts, or alleys within the area are unfit for human habitation, or (*b*) that the narrowness, closeness, and bad arrangement, or the bad condition of the streets and houses or groups of houses within the area, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defects, or one or more of such causes, are dangerous or injurious to the health of the inhabitants either of the buildings in the area or of the neighbouring buildings; and that the most satisfactory method of dealing with the evils connected with such houses, courts, or alleys, and the sanitary defects in the area, is a scheme (hereinafter referred to as an improvement scheme) for the rearrangement and reconstruction of the streets and houses within the area, or of some of such streets or houses, the local authority shall take such representation into their consideration, and if satisfied of the truth thereof, and of the sufficiency of their resources, shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area."

Sect. 38 provides that an improvement scheme of a local authority shall be accompanied by maps, particulars and estimates.

Sect. 39 provides that as soon as an improvement scheme has been prepared the local authority shall forthwith (*a*) publish in a local newspaper an advertisement stating the fact of such a scheme having been made, and naming a place where a copy of the scheme can be inspected; and (*b*) serve a notice on every owner, etc., of any lands proposed to be taken compulsorily, stating that such lands are proposed to be taken compulsorily for the purpose of such a scheme and requiring an answer whether the person dissents or not.

Sect. 40, sub-s. 1: "Upon compliance with the foregoing provisions with respect to the publication of an advertisement and the service of notices, the local authority shall present a petition to the Minister praying that an order may be made confirming such scheme."

Sub-s. 2: "The petition shall be accompanied by a copy of the scheme. . . . ."

Sub-s. 3: "The Minister after considering the petition may cause a local inquiry to be held, and, if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the

the town clerk and other officials to prepare a draft scheme in accordance with the Act with the necessary plans, particulars, and estimates. This was adopted by the Council on February 1. On February 16 reports by the medical officer and various officials were submitted to the Housing Committee together with a draft scheme, and the committee resolved to recommend the Council to adopt the scheme and take all necessary steps to obtain confirmation of it. On March 7 the report of the acting director of housing, with five plans showing the proposed lay out of the area, were laid before the Council, and after discussion were approved, and the seal of the Council was affixed to the draft scheme.

The draft scheme contained a clause (No. 5) which provided that "after obtaining possession of the land authorized to be taken by this scheme, the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working classes as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may

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scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses, may by order confirm the scheme with or without such conditions or modifications, so however that no addition shall be made to the land proposed in the scheme to be taken compulsorily."

Sub-s. 5: "The order of the Minister when made shall have effect as if enacted in this Act."

Sect. 46 contained provisions as to the assessment of compensation; the compensation to be paid for land included in any improvement scheme and acquired compulsorily on account of the sanitary condition of the premises thereon being dangerous or prejudicial to health being assessed on a different basis from the compensation to be paid in respect of land included in an improvement scheme only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon being dangerous or prejudicial to health.

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direct, or be sold, leased, or otherwise disposed of, as the Corporation may think fit."

The scheme having been duly advertised in the local newspapers, various documents were deposited at the town clerk's office for inspection, and all owners, etc., of land proposed to be taken compulsorily under the scheme were served with written notice. The documents deposited included a plan which showed the proposed lay out of the area, and also, coloured pink, the property to be taken on account of its sanitary condition, and, coloured blue, the property to be taken not on that account but only in order to make the scheme efficient, the methods of assessing the compensation payable under s. 46 of the Act being different in respect of the two classes of property.

The applicant, Abraham Yaffe, was the owner of two houses which were proposed to be taken, and his property was coloured pink on the plan, as being proposed to be taken on account of its sanitary condition. The applicant's objection to the scheme, as stated in a letter of his solicitors to the Minister of Health dated April 24, 1928, was based on the fact that his property was coloured pink on the map and not blue.

On April 4 the Corporation applied to the Minister of Health for confirmation of the scheme. The Minister thereupon directed a local inquiry to be held in pursuance of s. 43 of the Act of 1925, and that inquiry was held at Liverpool on May 1, 2 and 3, 1928. No plans showing the lay out of the area were then produced, nor were such plans submitted to the Minister when he was asked to confirm the scheme. On November 23, 1928, the Minister purported to make the Order complained of, by which he confirmed the scheme with very substantial modifications.

The applicant, Yaffe, applied for and obtained the rule nisi for a certiorari directed to the Minister of Health on March 26, 1929.

It was admitted in argument by the Attorney-General, that, having regard to the decision of the Court of Appeal in *Rex* v. *Minister of Health. Ex parte Davis* (1), the scheme

(1) [1929] 1 K. B. 619.

sent to the Minister of Health on April 4 was void and of no effect by reason of the inclusion in it of clause 5, and that if a writ of prohibition had been applied for before the Minister made the Order on November 23 purporting to confirm the scheme it must have issued. (1)

*Sir William Jowitt A.-G.* and *W. Bowstead* for the Minister of Health showed cause. The Order of the Minister approving the scheme was a good Order, having been made in conformity with the Housing Act of 1925, as he cut down the very wide powers contained in the scheme as sent to him, and as modified no objection could be taken to the scheme. Secondly, whether the Order of the Minister be a good one or not, s. 40, sub-s. 5, of the Act of 1925 precludes this Court from inquiring whether it is good or bad, because that sub-section provides that " the Order of the Minister when made shall have effect as if enacted in this Act." Lord Hewart C.J. said in *Rex* v. *Minister of Health. Ex parte Davis* (2): " It is common ground that, if this scheme should be approved or confirmed by the Minister in a form going beyond what the Act renders lawful, there is no remedy and there is no redress. On the contrary by s. 40, sub-s. 5, it is in terms provided that: ' The Order of the Minister when made shall have effect as if enacted in this Act.' " In the same case Avory J. said (3): "Having come to the conclusion that this scheme as it stands might possibly be sanctioned by the Minister, and that if once sanctioned by him there is no remedy by which the validity of it could be tested, I have come to the conclusion that we ought to interfere at this stage and grant this writ of prohibition." The leading case on this subject is *Institute of Patent Agents* v. *Lockwood.* (4) The Patents, Designs and Trade Marks Act, 1883, provided by s. 101 that " the Board of Trade may from time to time make such general rules . . . . as they think expedient, subject to the provisions of this Act: (*a*) For regulating the practice of registration under this Act." By sub-s. 3: " General rules may be made under this section . . . . and shall . . . . be of the same effect as if they were contained in this Act, and shall be judicially noticed." The Patents, Designs and Trade Marks Act, 1888, provided by s. 1 that " a person shall not be entitled to describe himself as a patent agent . . . . unless he is registered as a patent agent in pursuance of this Act." And by sub-s. 2 : " The Board of Trade shall . . . . make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of s. 101 of the principal Act " (the Act of 1883) " shall apply to all rules so made as if they were made in pursuance of that section." The Board of Trade made the Register of Patent Agent Rules, 1889, and the House of Lords held that the rules having been laid before both Houses of Parliament for forty days without being annulled were of the same effect as if they were contained in the statute, and as long as they remained in force it was not competent to question their authority. Lord Herschell L.C. in that case, discussing the difference between a rule and an enactment, said (1) that : " whereas apart from such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament." He went on to say : " I own I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act." He had previously said (2) : " My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts." Lord Watson, dealing with the words " shall be of the same effect as if they were contained in this Act, and shall be judicially noticed," said (3) : " I do not think I can express my opinion more clearly than by saying that I think they

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(1) The Attorney-General withdrew this admission in the Court of Appeal.

(2) [1929] 1 K. B. 626.

(3) Ibid. 630.

(4) [1894] A. C. 347.

(1) [1894] A. C. 360.
(2) [1894] A. C. 359.
(3) [1894] A. C. 365.

mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself." Lord Russell of Killowen also said (1): "I think that if the rules are to be read as part of the Act (as I think they ought to be) it is not, in this case, competent to judicial tribunals to reject them." Lord Morris, while agreeing that the rules were intra vires, dissented from the view that it was not competent for the Courts to question the validity of the rules.

[LORD HEWART C.J. As all the noble Lords in that case held that the rules in question were intra vires, are the observations of the noble Lords on this point of higher weight than obiter dicta?]

The members of the House proceeded to give their opinion upon both points, and the decision of the House could be supported upon this point as well as upon the point that the rules were intra vires.

[LORD HEWART C.J. Is not the Order referred to in sub-s. 5 of s. 40 of the Act of 1925 the same Order as is referred to in sub-s. 3? Does not that sub-section define the Order?]

The Legislature have used the most general words and said "the Order of the Minister." Unless sub-s. 5 means what we suggest and regularises what otherwise would be irregular the sub-section would have no meaning. The decision of the House of Lords in *Institute of Patent Agents* v. *Lockwood* (2) was followed by the Court of Session in *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners.* (3) There the Court held that regulations made by the Commissioners, which had not yet been laid before Parliament, could not be challenged in a Court of law as being ultra vires of the Commissioners provided they dealt with matters falling within the scope of Part I. of the National Insurance Act, 1911, but could be set aside only by means of the Parliamentary procedure provided by the section.

[LORD HEWART C.J. Lord Herschell in *Institute of Patent Agents* v. *Lockwood* (4) referred to the possibility of there being a conflict between a rule and a provision of the Act in the same way as there might be a conflict between two sections of the same Act, and he went on to say that one would have to try and reconcile them as best one could, and if you could not you had to determine which was the leading provision and which the subordinate provision. In the same way if this Order of the Minister is to be considered as being in the Act ought this Court not to see whether or not it is inconsistent with some other section of the Act ? ]

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(1) [1894] A. C. 367.
(2) Ibid. 347.
(3) 1915 S. C. 504.
(4) [1894] A. C. 360.

No. The Order of the Minister approving the scheme, with modifications, is to be considered as if enacted in the Act, and it cannot be treated as being inconsistent with some other section. The Court cannot consider whether the scheme is good or bad seeing that the Minister has approved it.

[*Rex* v. *Electricity Commissioners* (1) was also referred to.]

Thirdly, the granting of the relief asked for is discretionary, and owing to the attitude which the applicant adopted and the time which he allowed to elapse before applying for the rule the Court will not exercise its discretion and give the relief asked for.

*Wilfrid Greene K.C.* and *H. P. Glover* for the Liverpool Corporation adopted the argument of the Attorney-General.

*H. A. Hill* and *T. Worthington Naylor* for the applicant in support of the rule. The Order of the Minister was ultra vires, because in confirming the scheme he acted without jurisdiction. The Legislature did not give the Minister power to approve any scheme submitted to him so as to give his Order approving the scheme the force of an Act of Parliament. The Minister cannot make an Order confirming a scheme unless the conditions precedent laid down in the Act are complied with—namely, unless a proper scheme has been submitted to him which he can confirm without modification, and unless a local inquiry has been held on such scheme. In the present case no proper scheme was submitted to the Minister which he could approve without modification—it was not a housing scheme made in pursuance of the Housing Act—and no local inquiry was held on a proper scheme. The

(1) [1924] 1 K. B. 171, 212.

local inquiry which was held was held in respect of something which was not a scheme. Greer L.J. said in *Rex* v. *Minister of Health. Ex parte Davis* (1): "Under s. 40, sub-s. 3, the Minister may confirm the scheme, subject to conditions or modifications. But it was rightly admitted by the Attorney-General that the scheme presented for confirmation must be a proper scheme under the Act, such as could be confirmed as it stands without modification, and that the fact that the Minister might modify it so as to make it a good scheme would be no answer to an application for prohibition if, when presented for confirmation, it is not a good scheme within the Act." The learned Lord Justice later in his judgment said (2): "As I have said, in my judgment the scheme which the local authority must prepare is required by s. 35 to be a scheme for a rearrangement and reconstruction of streets and houses, and until they have prepared such a scheme there is nothing for the Minister to consider." Those extracts show that the Minister had no power to make an Order at all until the conditions precedent laid down in the Act have been complied with. It is not sufficient that the Minister says that the scheme was made under the Act; the conditions precedent must have been complied with.

[LORD HEWART C.J. Suppose a petition is presented to the Minister praying him to make an Order confirming a scheme, and the Minister does not cause a local inquiry to be held and he does not receive the report of an inspector, but nevertheless he makes an Order confirming the scheme. Would that Order have the force of an Act of Parliament?]

No. The Courts would not recognize the Order as a valid Order. There can be no Order of the Minister which has the force of a statute unless the conditions precedent required by the Act—namely, the making of a proper scheme, a petition by the local authority to the Minister to confirm the scheme, a local inquiry and a report by the inspector to the Minister—have been complied with. The scheme that was sent to the Minister for confirmation was admittedly so defective that it could have been the subject of a writ of prohibition, and equally it could not be confirmed by the Minister. The reasoning of the decision of Lord Herschell in *Institute of Patent Agents* v. *Lockwood* (1) was based upon the words of the sub-section, and was that (2): "any rule which in the opinion of the Board of Trade is required to be made in order to give effect to the section, is a rule made pursuant to the provisions of sub-section 2." But he speaks of the effect of a statutory rule "if validly made," clearly pointing to the conclusion that a rule if not validly made would not have that effect. The ratio decidendi of Lord Watson in the same case (3) was equally "that the whole scheme was left to the discretion of the Board of Trade. . . . . It was by their opinion, not by any judicial opinion, that the matter was to be determined." Lord Morris on the other hand held (4) that Courts of justice were not only competent, but that it was their duty, to consider whether the rules were ultra vires. *Institute of Patent Agents* v. *Lockwood* (1) was discussed and distinguished by Palles C.B. in *Reg.* (*Conyngham*) v. *Pharmaceutical Society of Ireland.* (5) He there held that the judgments in *Lockwood's* case (1) depended upon the conjoint effect of the generality of the power and the reservation to either House of power to proceed to annul the rules; that the decision did not apply to a section worded as s. 17 of the Pharmacy (Ireland) Act, 1875, was, and that therefore it was competent to the Court to determine whether or not a certain rule made by the Pharmaceutical Society of Ireland was ultra vires. In *Waterford Corporation* v. *Murphy* (6) Gordon J. held that a certain by-law made under the Waterford Bridge Act, 1906, was ultra vires, and that s. 10, which provided that "a printed copy of such by-laws . . . . purporting to be made and confirmed under the authority of this Act and signed by an assistant secretary of the Board of Trade shall be conclusive evidence of the validity of such by-laws," did not preclude the Court from inquiring into the validity of the by-law. He also discussed *Institute of Patent Agents* v. *Lockwood*, (1) and said (1): "It is clear from Lord Herschell's judgment that the ground of the decision in that case was the generality of the words used." In *Reg.* v. *Sankey* (2) the Divisional Court held that an Order in Council purporting to be made under the Elementary Education Acts, 1870 and 1873, was ultra vires, and also that it was not cured or made valid by the operation of s. 84 of the Act of 1870, which provided that "after the expiration of three months from the date of any order or requisition of the Education Department under this Act, such order or requisition shall be presumed to have been duly made and to be within the powers of this Act, and no objection to the legality thereof shall be entertained in any legal proceeding whatever." Lush J. said (3): "I think that this section only applies to orders which may be irregular to a given extent; but I cannot think it was meant to validate an Order which really amounts to a legislative enactment creating a new offence, if it should have been in operation for three months and no opportunity had arisen for testing its validity. I cannot hold that this is the meaning of that 84th section, where it is apparent as it must be taken to be that this is really a legislative provision without any authority given by the Act." The jurisdiction of the Court ought not to be taken away without very clear words. The words of sub-s. 5 of s. 40 are not so clear as to take away the jurisdiction of this Court to consider whether the Order of the Minister is ultra vires. That sub-section is really surplusage. The words "when made" in that sub-section refer to the proper sequence of events under the Act—namely, the representation of the medical officer, the making by the local authority of a proper scheme, the giving of the proper notices, the presentation to the Minister of a petition for confirmation of the scheme and the holding of a local inquiry.

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(1) [1929] 1 K. B. 649.

(2) [1929] 1 K. B. 653.

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(1) [1894] A. C. 347.
(2) Ibid. 359.
(3) [1894] A. C. 364.
(4) [1894] A. C. 365.
(5) [1899] 2 I. R. 132, 144.
(6) [1920] 2 I. R. 165.

*Cur. adv. vult.* (4)

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(1) [1920] 2 I. R. 170.

(2) (1878) 3 Q. B. D. 379.

(3) Ibid. 384.

(4) Judgment was reserved upon the first two points argued by the Attorney-General. If necessary counsel for the applicant was to have an opportunity of arguing the third point as to the exercise by the Court of its discretion in granting the writ.

1930. Jan. 14. The following judgments were read:—

SWIFT J. This case raises an important point of constitutional law, which so far as I know has never yet been decided, although there are dicta to be quoted on one side or the other, which may point to the correct decision or which may be quite irrelevant as guides leading to no correct conclusion in this particular case.

As I differ from my Lord and my brother Talbot I express my opinion with great diffidence, but having arrived at a firm conclusion I think it is my duty to state it.

The question raised may I think be stated thus: When Parliament delegates its powers of legislation to a Minister of the Crown, and enacts that in certain circumstances he may make "an Order," and that his Order "when made" shall have effect as if enacted in the Act, is it open to the Judiciary, if that alleged Order be challenged, to consider whether in fact "an Order" has been made?

By s. 40, sub-s. 3, of the Housing Act, 1925, it is provided that the Minister of Health in certain circumstances "may by Order" confirm a scheme. The Minister in this case alleges that he has made "an Order." That fact is challenged, and it is said that he could not have made and did not make the alleged Order—Can the Courts of law interfere?

The question arises in this way: Part II. of the Housing Act, 1925, imposes upon local authorities the duty of making schemes for the improvement of unhealthy areas in their district. Such schemes recognized by the Act are either "improvement" or "reconstruction" schemes.

By s. 40, sub-s. 3, the Minister of Health may by order confirm those schemes, and by sub-s. 5 "the order of the Minister when made shall have effect as if enacted in this Act."

This case comes before the Court on a rule nisi calling upon the Minister of Health to show cause why a writ of certiorari should not issue to remove into this Court a certain alleged Order made by the said Minister and dated on or about November 23, 1928, purporting to confirm a scheme known as "The Liverpool (Queen Anne Street) Improvement Scheme, 1928."

The answer of the Minister is that this Court has no power to canvass his Order, as under s. 40, sub-s. 5, it is of statutory effect; and he also contends that if there is power in the Court to discuss it the Order is intra vires; and he further contends that in the circumstances of this case the discretionary writ ought not to go in favour of the applicant.

Where an Order has been made by the Minister of Health in pursuance of s. 40, sub-s. 3, of the Act of 1925, it clearly has effect by virtue of sub-s. 5 as if in fact it were in the Act, and it may be that it is not competent for any Court to inquire into its validity or to question its propriety; but it seems to me that whether an Order has been made by the Minister so as to become a statutory enactment must be a question of fact; it cannot be enough that it should be said that the Minister has made an Order under the Act and therefore the jurisdiction of the Courts is ousted; there must always arise the question whether the Minister has in fact made an Order, which must depend upon the antecedent question whether he was in fact ever in a position to make the Order which he purports to have made.

To determine whether the Minister has in fact made an Order under this Act it is necessary to look at the requirements of the Act as to the making of an Order by him, and at the evidence as to what has been done in this case.

So far as improvement schemes are concerned it appears from s. 35, sub-s. 1, that where an official representation is made to a local authority as respects any area in the district of the authority which renders it desirable to deal with the houses, courts or alleys and the sanitary defects, the local authority " shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area."

An official representation for the purposes of such a resolution means a representation made to the local authority by the medical officer of health of that authority: s. 36, sub-s. 1. By s. 38, sub-s. 1, the requisites for improvement schemes are laid down, and by s. 39 the local authority is required to publish notices as soon as an improvement scheme has been prepared.

Before therefore a local authority approaches the Minister of Health with regard to an improvement scheme it is necessary: (1.) that an official representation shall have been made to the local authority; (2.) that the local authority shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area; (3.) that after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area; (4.) that maps, particulars and estimates shall accompany such scheme: s. 38, sub-s. 1; and (5.) that as soon as an improvement or reconstruction scheme has been prepared the local authority shall publish and serve the notices prescribed by s. 39.

Until these things have all been done the local authority cannot approach the Minister, and there is no power in him to make an Order on the local authority. His power is limited to confirming with or without conditions or modifications the scheme which the local authority has prepared. When the scheme is completed by the local authority in compliance with the provisions of the Act with respect to the publication of an advertisement and the service of notices, the local authority shall by virtue of s. 40, sub-s. 1, of the Act present a petition to the Minister praying that an Order may be made confirming such scheme.

By sub-s. 2 of s. 40 the petition shall be accompanied by a copy of the scheme, and by sub-s. 3 the Minister in considering the petition may cause a local inquiry to be held, and if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme, either absolutely or subject to conditions or modifications, will be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses, may "by Order" confirm the scheme with or without such conditions or modifications so however that no addition shall be made to the lands proposed in the scheme to be taken compulsorily.

Before therefore the statute gives the Minister any power to make an Order, before he is in a position to make an Order, and before it can be said that he has made any Order, it is necessary that all the steps preliminary to the making of a scheme as required by the Act shall have been gone through, and it is necessary that a scheme should have been submitted to the Minister and that a local inquiry should have been held thereon, and, in my opinion, if no inquiry has been held on a scheme, or if no scheme has been presented on petition, or if the proper notices have not been published and served, or if a scheme has not been adopted, or if no official representation as to the necessity of a scheme has been made, the Minister cannot make an Order and anything which he does purporting to make an Order cannot have any statutory effect.

The words of sub-s. 5 of s. 40 of the Act are: "The Order of the Minister when made shall have effect as if enacted in this Act."

I think that the words "when made" must be given effect to, and that they mean in this Act "when made in sequence with the events which the Act prescribes shall lead up to them," and if any of the steps required by the Act are omitted, in my view, the Minister has not made an Order within the meaning of sub-s. 3 of s. 40 (although indeed he may have purported to do so), and sub-s. 5 of s. 40 does not apply.

That being my view of the law I turn to the facts which are undisputed in this case in order to ascertain what really happened.

It appears that on January 18, 1928, the medical officer for the City of Liverpool made an official representation to the local authority, the result of which was that on March 7 at a council meeting the Common Seal of the lord mayor, aldermen and citizens was affixed to what was alleged to be a scheme to be cited as "The Liverpool (Queen Anne Street) Improvement Scheme, 1928," and that the alleged scheme was on April 4 sent by the town clerk to the Minister of Health.

The Minister thereupon directed a local inquiry to be held in pursuance of s. 40, sub-s. 3, of the Housing Act, 1925, and that inquiry took place on May 1, 2 and 3, 1928.

On November 23, 1928, the Minister purported to make an Order.

Now it is quite clear that the scheme embodied in the Order of November 23 is not the scheme which was forwarded by the town clerk to the Minister on April 4, and it is equally clear that what was forwarded by the town clerk to the Minister on April 4 was not a scheme at all. And it is equally clear that when the local inquiry was held on May 1, 2 and 3 no valid scheme was in existence or was inquired into, and it is further quite plain that after the scheme which is embodied in the Order of the Minister of November 23 came into existence no local inquiry was held.

It is admitted by the Attorney-General on behalf of the Minister of Health that the scheme sent to him on April 4 was a scheme which was void and of no effect.

It provided that " after obtaining possession of the land authorised to be taken by this scheme the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working classes as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased, or otherwise disposed of, as the Corporation may think fit."

It has been quite recently held in the Court of Appeal, affirming the decision of this Court, that a scheme in these terms is not an improvement scheme at all: *Rex* v. *Minister of Health. Ex parte Davis.* (1) The Attorney-General admitted that if a writ of prohibition had been applied for

(1) [1929] 1 K. B. 619.

before the Minister made what purports to be an Order on November 23 there would have been no answer.

It seems to me therefore that as a matter of fact certain essential steps before the Minister could make an Order were lacking. There was no "scheme," there was no "local inquiry" after a scheme had been prepared, and I do not think the time ever came when as a matter of fact he could make an Order.

Having come to the conclusion that the Minister in this case did not make an Order and never was in a position in which he could make an Order I am faced by the argument that he has purported to make an Order and that this Court cannot inquire into the validity of what he has done.

I do not agree. Among the facts of which by the law of our constitution the judges must take judicial notice are Acts of Parliament.

Stephen's Digest of the Law of Evidence, 10th ed., p. 70, art. 58, states: "It is the duty of all judges to take judicial notice of the following facts" . . . . (2.) "All public Acts of Parliament," and I accept that as an accurate statement of the law. When some proposition is alleged to have become an Act of Parliament it is the duty of all His Majesty's judges to take judicial notice of the fact—but it is a fact which has to be ascertained. In the case of an Act of Parliament the parties are not called upon to furnish proof, but the judge must satisfy himself as to the fact. If a document is alleged to be an Act of Parliament the judge must satisfy himself whether it is or is not. If he is unacquainted with such fact he may refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference: Stephen, p. 73, art. 59.

In the case of a Proclamation, Order or Regulation issued at any time by or under the authority of certain Government Departments (of which for the purposes of this case I assume the Ministry of Health is one), the contents of such Proclamation, Order or Regulation may be proved in certain ways: Stephen on Evidence sets them out on p. 89 in art. 83.

Such evidence is not I think conclusive, and it is open to any party to show that the certifying officer's signature was a forgery or that the Order had never been made or that it could not have been made.

It was argued that the Minister having made what purports to be an Order, this Court was bound to recognize it and to enforce it as though it were an Act of Parliament, and is precluded from questioning its validity as though it were an Act of Parliament.

I agree that His Majesty's judges are bound by the unwritten constitutional law of this country to take judicial notice of an Act of Parliament; but can it be suggested that they are bound to recognize as an Act of Parliament some document produced to them as having been passed by Parliament at a time when to their own knowledge no Parliament was sitting or when one or other of the Houses had refused to pass it or the Sovereign had refused his consent? We are bound I think, as part of the common law of England, to treat the Order of the Minister made under sub-s. 5 " when made " as statutory—but does that justify us in accepting or compel us to accept his mere ipse dixit that he has made "an order"? In my opinion, No. If we know, as in this case on the evidence we clearly do know, that he could not have made the Order, I believe that it is my duty to say he has not made the Order.

Two cases were cited in the course of argument as supporting the contention of the Minister—namely, *Institute of Patent Agents* v. *Lockwood* (1) and the case of *Rex* v. *Electricity Commissioners.* (2) I do not find in either of these cases any authority touching upon the question which I am considering.

In *Institute of Patent Agents* v. *Lockwood* (1) the question to be decided was whether certain rules made under the Patents, Designs and Trade Marks Act, 1883, were intra vires. All the noble Lords agreed that the regulations were

(1) [1894] A. C. 347.

(2) [1924] 1 K. B. 171.

intra vires, but it was suggested by the majority of them that the rules, having been laid before both Houses of Parliament for forty days, were of the same effect as if they were contained in the statute, and as long as they remained in force it was not competent to question their authority.

Lord Morris (1) dissented from this view and said: "What are the general rules which are to have the same effect as if they were contained in the Act? The general rules made under the section—general rules such as the legislature has, under s. 101, delegated to the Board of Trade the authority of making. But if a Court of Justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion they would be ultra vires, and it would be the duty of the Court not to regard them as operative."

I do not need to consider which of the conflicting views expressed in those speeches is correct; for to my mind it is obvious that if the noble Lords had been satisfied, either by their own inquiry into matters as to which it was their duty to take judicial notice, or by information which was tendered to them, that the rules in fact had only been laid before both Houses for "say" thirty-five days they would have had a very different question to decide and one much more analogous to the question I am now considering.

In *Rex* v. *Electricity Commissioners* (2) the only question which was to be decided was whether an application for a writ of prohibition was premature. The Court decided that it was not; but Mr. Talbot K.C. (as he then was) argued (3) "both certiorari and prohibition lie to a body like the Electricity Commissioners," and he went on to cite the case of *Rex* v. *The Inhabitants in Glamorganshire* (4), where it was said: "This Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see that they keep themselves within their jurisdiction; and if they exceed it, to restrain them."

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(1) [1894] A. C. 366.
(2) [1924] 1 K. B. 171.
(3) [1924] 1 K. B. 183.
(4) (1700) 1 Ld. Raym. 580.

Bankes L.J. said (1): "The effect of legislation in this form was discussed in the case of *Institute of Patent Agents* v. *Lockwood* (2), where Lord Watson concludes his speech by saying: 'Such rules are to be as effectual as if they were part of the statute itself.' The effect of accepting the argument of the Attorney-General on this point would be very far reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is adopted, to come to a Court of law and demand an inquiry whether the action or decision, of which he is complaining is ultra vires or not. I question very much whether Parliament had any deliberate intention of producing this result by adopting this particular form of legislation."

Younger L.J. (now Lord Blanesburgh) said (3): "Parliament has not by the Act conferred upon the Minister of Transport, nor has it in terms reserved to itself by a mere resolution of both Houses power, under the name of modifications in a scheme of the Commissioners, to insert in a scheme provisions which would under the Act be beyond the powers of the Commissioners if inserted in the scheme by them in the first instance. So, at any rate, I read the Act. Fortunately, however, it is not necessary in this case to decide the very serious question whether, if at any time Parliament should approve by resolution of each House a scheme which, adopting if I may the language of Lord Robertson in *Russell* v. *Magistrates of Hamilton* (4), could in fact be shown to be 'an abuse' of the statute, the scheme so approved would nevertheless by virtue of s. 7, sub-s. 2, 'have effect as if enacted in this Act,' and would have to be given statutory force by every Court in which its terms were canvassed. To suggest that such a question is one which may in view of the terms of this subsection arise, is not of course to suggest that Parliament

(1) [1924] 1 K. B. 191.
(2) [1894] A. C. 347, 365.
(3) [1924] 1 K. B. 212.
(4) (1897) 25 R. 350, 357.

cannot sanction and give the effect of statute law to any scheme it likes. It is only to suggest that it may not have in this Act reserved to itself the power by a mere resolution of each House to give statutory effect to a scheme the formulation of which it has not by the statute authorized. No such serious question however arises for decision now."

I cannot find in the language used in either of these cases anything which suggests that the mere fact that somebody has said that an Order has been made precludes this Court from considering as a fact whether such Order has been made or could indeed have been made within the terms of the Act of Parliament.

I come finally to examine the case of *Rex* v. *Minister of Health. Ex parte Davis* (1), upon which it is argued that the language used in the judgments in this Court and the Court of Appeal are conclusive authority for saying that we cannot now inquire into the validity of this purported Order.

It is argued that this case is an authority for the proposition that when once the Minister has purported to make an Order this Court cannot inquire into its validity. I cannot assent to any such proposition. In that case on an application for a writ of prohibition to prevent the Minister from proceeding to sanction a scheme it was stated at the Bar (2) that " the applicants are obliged to act at once, because by s. 40, sub-s. 5, the order of the Minister confirming the scheme is to take effect as if enacted in the Act."

At the time that case was argued in this Court the Minister had not made an Order and the question I am now considering had not arisen, but the Lord Chief Justice did say (3) : " Is this a proper case for prohibition ? It is common ground that, if this scheme should be approved or confirmed by the Minister in a form going beyond what the Act renders lawful, there is no remedy and there is no redress. On the contrary by s. 40, sub-s. 5, it is in terms provided that : ' The order of the Minister when made shall have effect as if enacted in this Act.' "

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(1) [1929] 1 K. B. 619.
(2) [1929] 1 K. B. 623.
(3) [1929] 1 K. B. 626.

In that case it was regarded as common ground that if the Minister purported to make an Order that Order could not be questioned. But is that right? The only question was whether the application for the writ of prohibition was or was not premature. The Lord Chief Justice goes on to cite Atkin L.J. in the Court of Appeal in *Rex* v. *Electricity Commissioners* (1), and sets out part of his judgment. This is I think certainly no authority for saying that the final act cannot be questioned, and in the Court of Appeal in that case Younger L.J. seems from the report to be of opinion that even if an Order had been made it would still have been open to the Court to inquire whether the scheme was one which under the Act there was power to formulate and, if not, to quash the Order as ultra vires.

Avory J. in *Rex* v. *Minister of Health. Ex parte Davis* said (2): "Having come to the conclusion that this scheme as it stands might possibly be sanctioned by the Minister, and that if once sanctioned by him there is no remedy by which the validity of it could be tested, I have come to the conclusion that we ought to interfere at this stage and grant this writ of prohibition." I cannot believe that in those few words at the end of his judgment "if once sanctioned by him there is no remedy by which the validity of it could be tested" Avory J. intended to decide a point of constitutional law which is of great importance to the community, but which was not in issue in that case, and had not been argued before him.

In the Court of Appeal nothing was said as to the Order being beyond canvass, but Lawrence L.J. dealt with the matter in this way (3): "Sect. 40 deals with the confirmation by the Minister of the improvement scheme. The Minister may cause a local inquiry to be held, but as he is only empowered to confirm the scheme if he is satisfied on the report on such an inquiry as to the matters mentioned in the section, it follows that no improvement scheme can be confirmed by the Minister unless there has been a local inquiry at which all persons interested would presumably be given an opportunity of being heard. The order of the Minister confirming the scheme may incorporate the provisions of the Lands Clauses Acts, and is to have effect as if it were enacted by the Act. As the Attorney-General rightly said, this section shows that, although the local authority proposes, it is the Minister who disposes. There is apparently no limit placed on the powers of the Minister to impose conditions and modifications, except as to any addition to the land to be taken compulsorily. This wide power of confirmation, however, does not, in my opinion, justify the local authority in submitting a scheme which does not comply with the statutory requirements of an improvement scheme, nor does it empower the Minister to consider such a scheme."

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(1) [1924] 1 K. B. 171, 204.

(2) [1929] 1 K. B. 630.

(3) [1929] 1 K. B. 644.

Greer L.J. said (1): "Under s. 40, sub-s. 3, the Minister may confirm the scheme, subject to conditions or modifications, But it was rightly admitted by the Attorney-General that the scheme presented for confirmation must be a proper scheme under the Act, such as could be confirmed as it stands without modification, and that the fact that the Minister might modify it so as to make it a good scheme would be no answer to an application for prohibition if, when presented for confirmation, it is not a good scheme within the Act." Later in his judgment he said (2): "As I have said, in my judgment the scheme which the local authority must prepare is required by s. 35 to be a scheme for a rearrangement and reconstruction of streets and houses, and until they have prepared such a scheme there is nothing for the Minister to consider."

If therefore the Minister could not make an Order in the circumstances of this case by what rule of law are we bound to say he has made an Order? I can find none. It may be that the fact that he says that he has made an Order is evidence that he has done so, but if that evidence is rebutted by proof of facts which show that he has not, and we are satisfied that he has not, then it is our duty to say so.

The fallacy in the arguments of the Attorney-General for the Minister seems to me to lie in a confusion between

(1) [1929] 1 K. B. 649. (2) [1929] 1 K. B. 653.

sub-s. 3 and sub-s. 5 of s. 40. Sub-s. 5 does not operate until sub-s. 3 has in fact been complied with. Here it never was. It may well be that if sub-s. 3 had been duly complied with and an Order had been made and a question had arisen whether such Order was ultra vires as sanctioning a scheme outside the scope of the Minister's authority the question raised by the noble Lords in *Lockwood's* case (1) and Lord Morris's dissenting views would have to be considered—but to my mind that point does not arise in this case. Here no Order was made under sub-s. 3, therefore sub-s. 5 does not operate at all.

It was argued that if it were open to this Court to canvass the propriety of the Minister's Order sub-s. 5 of s. 40 of the Act would be useless and inoperative. I cannot take this view. When this Order is made it has statutory effect—that is to say nobody can question anything done within the four corners of the scheme which the "Order" incorporates into the Act. Nobody affected can resist the directions of the scheme or sue for trespass for anything done under and in pursuance of the scheme, but surely it must be open to any citizen to say, just as he may say there is no such Act of Parliament, there is no such scheme and no such Order.

If once an Order is made it becomes part of the Act of Parliament. It has all the strength and virtue of the Act, it is incorporated in it and nobody can question it, but in my view it is open to any citizen adversely affected to inquire "Is this in truth an Order made under the Act or is it something which has without justification obtained the semblance of such an Order?" And if upon investigation this Court is satisfied that the "thing" which is purporting to be an Order of the Minister is not, and cannot in fact be, an Order within the meaning of s. 40, sub-s. 3, of the Act, ought it not to say so?

For these reasons I think the purported Order should be removed into this Court to be quashed. I do not consider for the purposes of to-day whether the scheme is or is not intra vires, nor whether this Court can discuss that question.

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(1) [1894] A. C. 347.

I am also of opinion that in all the circumstances of this case the applicant has not by any "laches" on his part lost his right to this discretionary writ, and that the rule should be made absolute.

TALBOT J. I regret I am not able to take the same view of this case as my brother. In this case a rule has been granted to the Minister of Health to show cause why a writ of certiorari should not issue to remove into this Court an Order by him dated November 23, 1928, purporting to confirm a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme, 1928, and particulars prepared by the Council of the City of Liverpool as modified and set out in the said Order.

The scheme was prepared by the Liverpool Council and the confirming Order made by the Minister of Health, purporting to act under the Housing Act, 1925, Part II. The rule was obtained on the ground that the Minister had no jurisdiction to make the Order, because the scheme which the Order purported to confirm was not a scheme within the meaning of the Housing Act for various reasons set out in the rule, the first of which is that "it contained no concrete proposal for the development of the land within the Queen Anne Street area after acquisition by the Liverpool Corporation and did not provide for the rearrangement or reconstruction of the streets and houses in the area or of some of such streets and houses."

This is the only ground upon which the rule was supported before us; and it is based upon the fact that the scheme as submitted to the Minister contained a clause (No. 5), which has already been read. This clause appears to have been copied from precedents of Provisional Orders drawn at a time when schemes of this nature were sanctioned by Provisional Order confirmed by Parliament: see the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). The effect of it is that when the land covered by the scheme has been taken, the Corporation, having appropriated an undefined part of it to the erection of working-class dwellings if they considered such dwellings to be required, would be at liberty to use or dispose of the rest in any way which they might think fit. It was clear from the scheme that in fact no surplus land not used either for working-class dwellings, or for streets, yards, gardens, etc., judged to be necessary or desirable in conjunction with such dwellings, was intended to be left. But the Attorney-General in view of the decision in *Rex* v. *Minister of Health. Ex parte Davis* (1) admitted that if a writ had been applied for to prohibit the Minister from proceeding further in the matter of the scheme at a time before it had been actually confirmed by his Order, it must have issued. And we were asked to make this rule for certiorari absolute on the ground that inasmuch as the Minister might have been prohibited from considering the scheme because he had no jurisdiction under the Housing Act, 1925, to confirm it, the Order confirming it is not an Order made under the Act, and is therefore ultra vires. In fact the Order very materially altered the scheme submitted to the Minister, and it is not suggested that as the scheme now stands it is not one which might have been lawfully submitted and confirmed. We are asked therefore in effect to annul a scheme which, if it had been originally drawn in the shape in which it now is, could not have been complained of in a Court of law.

In showing cause the Attorney-General argued (1.) that the Order is good as having been made in conformity with the Act; (2.) that the Court cannot inquire whether it is good or not, because when once made it has by s. 40, sub-s. 5, effect as if enacted by the Act; (3.) that in any case the applicant is (by reason of delay) not entitled to the writ.

I will summarize the material provisions of the Act. The first step towards the preparation and execution of an "improvement scheme" is a representation to a local authority by the medical officer of health as to an area in its district that houses, streets, courts, etc., therein are in such a condition, or so ill arranged, as to be unfit for habitation or dangerous to health, and that this state of things can best

(1) [1929] 1 K. B. 619.

be dealt with by a scheme for the rearrangement and reconstruction of the streets and houses in the area. The local authority are to consider the representation and, if they agree with it, are to resolve that the area is an unhealthy area, and are forthwith to make a scheme for improving it. This is in summary the effect of ss. 35 and 36 of the Act. By s. 38 an improvement scheme must be accompanied by maps, particulars and estimates, and must distinguish lands proposed to be taken compulsorily. Other things which a scheme must or may contain are set forth in the section. Sect. 39 provides for the publication of the scheme and for the service of the appropriate notices on owners and others interested in lands proposed to be taken compulsorily, and by s. 40 when this has been done the local authority are to petition the Minister for an Order confirming the scheme. On this the Minister may order a local inquiry, and "if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses, may by Order confirm the scheme with or without such conditions or modifications, so however that no addition shall be made to the lands proposed in the scheme to be taken compulsorily" (sub-s. 3). By sub-s. 5: "The Order of the Minister when made shall have effect as if enacted in this Act." Sect. 46 contains special provisions as to the assessment of compensation for land taken compulsorily.

The history of the scheme and Order now in question is briefly as follows: On January 18, 1928, the Corporation received a representation from the medical officer for the city, following the language of s. 35 of the Act, and recommending an improvement scheme dealing with an area defined in a schedule appended. On January 19 the Housing Committee of the Corporation resolved to recommend the Council to declare the area an unhealthy area and to instruct the town clerk and other officials to prepare a draft scheme in accordance with the Act with the necessary plans, particulars and estimates. This was adopted by the Council on February 1. On February 16 reports by the medical officer, the acting director of housing, the land steward and surveyor and the town clerk were submitted to the Housing Committee together with a draft scheme with particulars and statements, plans, and estimates, and the Committee resolved to recommend the Council to adopt the scheme and take all necessary steps to obtain confirmation of it.

On March 7 the report of the acting director of housing, with five plans showing (amongst other things) the proposed lay-out of the area, were laid before the Council and after discussion approved, and the seal of the Council was affixed to the draft scheme. It is this scheme which contained the clause mentioned above and as the Attorney-General admitted) was therefore ultra vires and bad. The scheme having been duly advertised in the local newspapers, certain documents were, in pursuance of the advertisements, deposited at the town clerk's office for inspection. All owners, occupiers and lessees of land proposed to be taken compulsorily under the scheme had been served with written notices stating where these documents were to be seen. The applicant, Mr. A. Yaffe, is the owner of two houses proposed to be so taken. The documents included a plan which shows the proposed lay-out of the area, and shows also, coloured pink and blue respectively, property to be taken on account of its sanitary condition, and property to be taken not on that account, but only in order to make the scheme efficient. Under s. 46 of the Act different methods of assessing the compensation payable are applicable to these two classes of property. The applicant's property is coloured pink on the plan above mentioned as being to be taken on account of its sanitary condition. In reply to an affidavit by Mr. Yaffe in which he states that he never personally saw any plan of the lay-out of the area it is sworn by Mr. Dabell, a clerk in the town clerk's department, that Mr. Yaffe called several times to inspect the documents mentioned above; and that Mr. Dabell himself explained the plan to him. Further, among the five plans, exhibited to the affidavit of Mr. Keay and laid before the City Corporation with his report on March 7, is one which shows the proposed lay-out of the area and the classification of the properties on it by different colours as explained above.

The Corporation having applied to the Minister for confirmation of the scheme a local inquiry was held in Liverpool on May 1, 2 and 3, 1928, by Mr. H. A. Chapman, F.R.I.B.A., an inspector of the Ministry. A letter had been previously sent on April 16 from the Ministry to all owners of property proposed to be taken compulsorily giving notice of the inquiry, and inviting a statement of any objections to the scheme or to the colouring of the several properties on the plans then deposited at the municipal buildings. In answer to this letter Mr. Yaffe's solicitors wrote on April 24 as follows: (J. C. W. 1) "Our client's objection to the above scheme is based on the fact that his property is coloured pink on the map and not blue." It appears from Mr. Chapman's affidavit that before the commencement of the inquiry he was furnished with the proposals for the lay-out of the area and had seen the five plans mentioned above; and from his affidavit and that of Mr. Keay that those plans were in the room during the whole of the inquiry. So far as we can judge from the extracts from the transcript of the shorthand notes, which were in evidence before us, Mr. Chapman appears to have forgotten both these facts while he was presiding at the inquiry. The Order of the Minister was made on November 23, 1928, and the rule which we are asked to make absolute was moved for and granted on March 16, 1929. It was claimed by the Attorney-General that on the ground of delay only the applicant was not entitled to the relief sought.

I have gone through the history of the case in some detail, but as I have already said, the only question (apart from that of delay on the part of the applicant) which was actually argued before us, was whether the effect of s. 40, sub-s. 5, of the Act is to preclude the Court from considering whether or not the Order of November 23, 1928, was one which the Minister had power to make. And this question depends, as I have said, not on anything to be found in the Order itself,

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but on the fact that the scheme which (with modifications) it confirmed was one which (as was conceded) by proceedings taken in time the Corporation could have been prevented from submitting and the Minister could have been prevented from confirming.

It is not, and could not, in view of the authorities, particularly *Institute of Patent Agents* v. *Lockwood* (1), be disputed that if this Order is an Order made by the Minister within s. 40, sub-s. 5, it can no more be quashed by this Court than the statute of which it is by the sub-section to be treated as part. The argument is (shortly) that s. 40, sub-s. 5, applies only to Orders which under the Act the Minister had jurisdiction to make; that he had no jurisdiction to confirm a scheme such as this: *Rex* v. *Minister of Health. Ex parte Davis* (2), and therefore no jurisdiction to make this Order.

This construction of the sub-section is directly contrary to the opinion of Lord Hewart C.J. and Avory J. in the case referred to, and it is certainly a formidable point that in the very case which decided that a scheme in the form originally adopted by the Corporation in this case must be annulled as not being in conformity with the Act under which it purported to be made, it was clearly recognized that if it were once confirmed by the Minister, its validity could no longer be challenged in a Court of law. I will read only a few passages from the judgment of my Lord (3): "It is common ground that, if this scheme should be approved or confirmed by the Minister in a form going beyond what the Act renders lawful, there is no remedy and there is no redress. On the contrary by s. 40, sub-s. 5, it is in terms provided that: 'The order of the Minister when made shall have effect as if enacted in this Act,'" and again (4): ". . . . this matter had reached its last stage but one; the last stage, if it were to be reached, would be the stage in which the order would have assumed all the authority of an Act of Parliament. If check there is to be, it must be imposed now." And Avory J. said (5): "Having come to the conclusion that this

(1) [1894] A. C. 347.
(2) [1929] 1 K. B. 619.
(3) [1929] 1 K. B. 626.
(4) Ibid. 627.
(5) [1929] 1 K. B. 630.

scheme as it stands might possibly be sanctioned by the Minister, and that if once sanctioned by him there is no remedy by which the validity of it could be tested, I have come to the conclusion that we ought to interfere at this stage and grant this writ of prohibition." The judgments in the Court of Appeal do not appear to mention this point.

In my opinion however, the really decisive answer to the argument in support of this rule is that it deprives s. 40, sub-s. 5, of all real meaning. If a scheme, and therefore an Order confirming it, is within the Act, then the Order is good whether or not it has effect as if enacted by the Act. In other words this sub-section which is clearly intended to protect something which would otherwise be in peril would be without effect in the only case in which its protection is needed. The learned counsel who supported the rule did not shrink from this position, he admitted that on his construction of the Act the sub-section was mere surplusage without any practical effect at all. I cannot think that this is a reasonable method of construction. The words of sub-s. 5 are direct and emphatic; and we are bound to give them if possible some effect.

In the light of the decision in *Rex* v. *Minister of Health. Ex parte Davis* (1) I take the result of the legislation to be that so long as no Order has been made by the Minister the Courts have power to prohibit him from proceeding with an Order for confirming a scheme which is ultra vires, but once a confirming Order is made it has statutory authority, and no question of ultra vires can be raised in a Court of law. If no proceedings are taken in Court, the Minister will no doubt himself consider (inter alia) the question whether the scheme as submitted to him is in accordance with the statute, for on that supposition he has not been relieved of the necessity of considering it by the decision of a Court upon it: see the judgment of Younger L.J. in *Rex* v. *Electricity Commissioners.* (2) In the case before us the Minister appears to have so acted and to have modified the scheme so as to bring it within the Act. As confirmed the scheme appears to be

(1) [1929] 1 K. B. 619.

(2) [1924] 1 K. B. 213.

in all points such as the Act authorizes and the application to avoid it has therefore no real merits. The effect would be to annul a scheme which if it had been originally drawn in its present form could not have been successfully attacked.

In my opinion sub-s. 5 of s. 40 means simply "As soon as the Minister has made an Order in pursuance of the Act it shall have effect as if enacted in this Act," and he makes an Order in pursuance of the Act if, intending and purporting to make it under the Act, he confirms, with or without modification, a scheme which is itself made (in the same sense) in pursuance of the Act. This seems to me to be the plain meaning of the legislation, and to give effect to the intention with which it was passed. To read it otherwise, so that no Order falls within sub-s. 5 unless it confirms a scheme which is in all respects in conformity with the statute, seems to me an unnatural refinement which prevents the sub-section from giving protection in the very case in which it is obviously designed to give it, and in which alone it is needed. There are many cases in which special protection having been given to persons sued for acts done "in pursuance of" a particular statute, and it being argued that this cannot apply to acts which the statute does not authorize, the Courts have held that it is enough if the person who relies on the protection shows that he intended bona fide to act under the statute. Two examples may be given.

In *Pratt* v. *Hillman* (1) a Building Act (14 Geo. 3, c. 78) allowed party-walls to be raised on certain conditions, and s. 42 contained these words: "Nor shall any party-wall hereafter be raised, unless the same can be done with safety to such wall, and the several buildings adjoining thereto." It was also provided by s. 100 that "no action or suit shall be commenced against any person or persons for any thing done in pursuance of this Act, until twenty-one days after notice, in writing, of an intention to bring such action or suit, has been given to the person or persons against whom such action or suit shall be brought, nor after the expiration of three calendar months next after the fact committed."

(1) (1825) 4 B. & C. 269.

The arbitrator—the case having been referred to an arbitrator—having found that the wall as it was built was not at all conformable to the provisions of the Building Act, it was argued: "Under such circumstances, it cannot be said that the wall was raised in pursuance of the Act, and consequently the defendants are not in a situation to claim the protection of the 100th section." Abbott C.J. rejected that contention in these words (1): "I consider the 42nd section of the 14 Geo. 3, c. 78, as having given an authority to raise party-walls. But that authority must be exercised in a particular mode, and under certain circumstances. If it be so exercised the party is altogether justified. But if a party intending to act under the authority given, does not pursue the particular directions laid down, he is not altogether justified, but must answer for the damage occasioned by that which he has done. Still, however, he is entitled to the protection given by the 100th section; and as this plaintiff did not give the notice or commence his action within the period prescribed by that section, the arbitrator very properly ordered the verdict to be entered for the defendants."

Similarly in *Theobald* v. *Crichmore* (2), where the headnote is as follows: "Where a constable, having a magistrate's warrant of distress to levy a church rate, under the statute 53 Geo. 3, c. 127, broke the door of and entered plaintiff's dwelling-house: Held that, although he thereby exceeded his authority, yet that no action could be maintained after the expiration of three calendar months." The statute provided by s. 12 that "if any action or suit shall be brought or commenced for anything done in pursuance of this Act, every such action or suit shall be commenced within three calendar months next after the fact committed, and not afterwards." At the trial the learned judge, who tried the case, held: "that as the defendant at the time of this trespass was not acting in obedience to the warrant, he could not be considered within the protection of the statute," that is to say, what he had done illegally in breaking open the door and forcibly entering the dwelling-house could not be said to have been done in pursuance of the Act. The Court of King's Bench made absolute a rule for a new trial. Lord Ellenborough C.J. in giving judgment said this (1): "It is perfectly clear that the defendant had no right to break the outer door for the purpose of executing his warrant of distress. The question is, then, whether he can be said to have acted in pursuance of the statute within the meaning of that term as there used: if it meant only acts lawfully done under the authority of the statute, he would not be protected. But the object was clearly to protect persons acting illegally, but in supposed pursuance, and with a bona fide intention of discharging their duty under the Act of Parliament. The argument goes to show, that in every case where the law is exceeded, the officer loses the benefit of the statute: but in those cases only can he require its protection. It was evidently the intention of the legislature to give this protection in a case where he had acted illegally through ignorance or inadvertence. There is no evidence in this case to show that he acted with any other intention than that of executing the authority delegated to him by the warrant; and I am therefore of opinion that the action is commenced too late, and that this rule should be made absolute."

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(1) 4 B. & C. 271.

(2) (1818) 1 B. & Ald. 227.

So here, in my opinion, the Order mentioned in sub-s. 5 of s. 40 is any Order bona fide intended and purporting to be made under s. 40 whether or not there was originally jurisdiction to make it.

If this is right we are not called on to consider, and indeed have no right to consider, whether this Order is good or not, but I may say that no ground has been shown, and I see none, for thinking that we ought to quash an Order of this kind on certiorari merely because, although the scheme which it sanctions is perfectly in conformity with the Act, the Minister could have been prevented from confirming the scheme originally submitted to him, because as so submitted it contained something which the Act does not authorize.

It is unnecessary in the circumstances to consider the question of the applicant's delay.

(1) (1818) 1 B. & Ald. 229.

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In my opinion on the first and second of the three grounds alleged by the Attorney-General this rule should be discharged.

LORD HEWART C.J. I have come to the conclusion, not without doubt and reluctance, that this rule ought to be discharged. It is with regret and respect that I differ from part of the judgment of my brother Swift. It is not necessary to reiterate the history of the case. But there are two peculiar features which seem clearly to stand out. One is that the so-called improvement scheme, as first prepared and presented, was of such a kind that, as the learned Attorney-General frankly admitted, if proper steps had been taken before the Order of the Minister was made, a rule nisi for a writ of prohibition, prohibiting the Minister from proceeding further in the matter, might well have been made absolute: see *Rex* v. *Minister of Health. Ex parte Davis.* (1) The other peculiar feature is that, nevertheless, the scheme had been so modified, in the form in which the Order of the Minister purported to confirm it, that, if it had originally possessed that form, it would not in itself have contravened the provisions of the Act. In these circumstances it seems to me that the words of s. 40, sub-s. 5, of the Act, providing that "the Order of the Minister when made shall have effect as if enacted in this Act," are sufficient to cover the irregularities which preceded the making of the Order. Notwithstanding those irregularities, I am satisfied that the Order of the Minister here purported to be made, and was in good faith intended to be made, in pursuance of the provisions of the Act. It is upon that ground alone that I base my judgment, and, in view of the facts of the present case, I do not think it necessary to enter upon the larger questions which were referred to in the course of a highly interesting argument.

*Rule discharged.*

R. F. S.

The applicant appealed. The appeal was heard on March 25, 26, 27, 1930.

*H. A. Hill* and *A. W. Nicholls* for the appellant. It was admitted by the Attorney-General in the Divisional Court

(1) [1929] 1 K. B. 619.

that by virtue of the decision in *Rex* v. *Minister of Health. Ex parte Davis* (1) this scheme, when submitted to the Minister of Health, was invalid, and that if before its confirmation a writ of prohibition had been applied for it would have issued.

[*Sir William Jowitt A.-G.* I agree that I made that admission in the Divisional Court, but I make no admission in this Court. There are differences between the present scheme and the scheme in *Davis's* case. (1)]

There are no essential differences, and *Davis's* case (1) makes it quite clear that prohibition would have lain if applied for before the Minister purported to confirm the scheme. Then, does the fact that the Minister purported to confirm it preclude the Court from inquiring into its validity ? Sect. 40, sub-s. 5, of the Housing Act, 1925, which is relied upon as excluding such an inquiry, has not the far-reaching effect attributed to it. It is significant that the draftsman of the Act, when he wished to make it clear beyond controversy that the validity of an Order made by the Minister shall not be questioned, knew perfectly well how to do so, as is evident from Schedule III., cl. 2, of the Act. That Schedule, which relates to the compulsory acquisition of land by a local authority for the purposes of Part III. of the Act—namely, for providing houses for the working classes, enacts by cl. 2 that the Minister may confirm an Order, which, "when so confirmed shall, save as otherwise expressly provided by this Schedule, become final and have effect as if enacted in this Act ; and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with, and that the Order has been duly made and is within the powers of this Act." Where such language is used, no doubt inquiry by the Court is excluded : see *Rex* v. *Middlesex Justices* (2) ; *Ex parte Ringer* (3) ; but in the absence of clear words it is open to the Court to inquire into the validity of a scheme which the Minister has purported to confirm. As in this case the scheme

(1) [1929] 1 K. B. 619.
(2) [1907] 2 K. B. 581.
(3) (1909) 73 J. P. 436.

when submitted to the Minister was invalid, his right to legislate never arose. Sect. 40, sub-s. 5, merely gives legislative force to that which has been regularly done.

[They referred to *Ex parte Bradlaugh.* (1)]

*Sir William Jowitt A.-G.* and *W. Bowstead* for the Minister of Health. Sect. 40, sub-s. 5, of the Housing Act, 1925, clearly gives statutory force to the Order made by the Minister, and indeed is unnecessary unless it has the meaning we attribute to it. It has been supposed that this is a new method of legislation, but in fact it is as old as the fourteenth century: see Stubbs' Constitutional History of England, vol. ii., p. 588*n.*; and in more modern times it has frequently been resorted to: see 3 & 4 Will. 4, c. 42, s. 1, as to the binding force of Rules of Court; the Naturalization Act, 1870, s. 11, as to regulations made by a Secretary of State. Similar provisions are contained in the Irish Land Act, 1870, s. 31, and in the Tramways Act, 1870, s. 64. The rule for construing such Orders and Regulations was laid down by Brett L.J. in *Dale's* case (2) and by Lord Herschell L.C. in *Institute of Patent Agents* v. *Lockwood* (3)—namely, that the Act and the subordinate legislation are to be read together as if they were one Act. The last cited case clearly shows that an Order when confirmed has statutory effect; and to the same effect is *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners.* (4)

[SCRUTTON L.J. Is the decision in that case consistent with *Rex* v. *Electricity Commissioners*? (5)]

Yes. In the latter case the scheme, after confirmation, was to be laid before each House of Parliament and was not to come into operation until approved by a resolution of each House, and when so approved was to have effect as if enacted in the Electricity (Supply) Act, 1919; but there the Court was considering the scheme before its confirmation. In *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners* (4) the Regulations had been made and became at once part of the Act, although they might be annulled by His Majesty in Council on an address presented by either House. Bearing in mind that the original procedure in these matters was by provisional order which became part of the Act confirming it, and that by s. 5, sub-s. 2, of the Housing of the Working Classes Act, 1903, the provision of the Housing of the Working Classes Act, 1890, which required confirmation of an Order by Parliament was repealed, it was obviously intended that the words of the Act of 1925—an Act which is described as a consolidating Act—namely, that "the Order of the Minister when made shall have effect as if enacted in this Act," should bring about the same result as was formerly effected by a provisional order duly confirmed. The language of cl. 2 of Schedule III. is copied from Schedule I., cl. 2, of the Housing, Town Planning, &c., Act, 1909, and thus negatives the idea of any deliberate intention on the part of the Legislature in the Act of 1925 to depart from the clear words of s. 40, sub-s. 5, of the Act of 1925. To decide whether an Order made by a subordinate authority is within the power conferred by the Legislature, the test is whether the authority honestly intends to act and honestly believes that it is acting in pursuance of the power conferred: *Ex parte Foreman.* (1)

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(1) (1878) 3 Q. B. D. 509.
(2) (1881) 6 Q. B. D. 376, 455.
(3) [1894] A. C. 347.
(4) 1915 S. C. 504.
(5) [1924] 1 K. B. 171.

We reserve the right to question the correctness of *Rex* v. *Minister of Health. Ex parte Davis.* (2)

Apart from the question of the construction of the section under discussion, the writ of certiorari—which is not a writ of course: see *Reg.* v. *Surrey Justices* (3)—should not issue in this case, both on the ground that the applicant has no merits—his sole objection to the scheme is that his land is coloured pink and not blue—and on the ground of delay in making his application: see *Reg.* v. *South Holland Drainage Committee Men* (4); *Reg.* v. *Manchester and Leeds Ry. Co.* (5); *Reg.* v. *Wigan (All Saints) Churchwardens* (6); *Reg.* v. *Sheward.* (7)

(1) (1887) 18 Q. B. D. 393.
(2) [1929] 1 K. B. 619.
(3) (1870) L. R. 5 Q. B. 466, 472.
(4) (1838) 8 A. & E. 429.
(5) (1838) 1 P. & D. 164.
(6) (1876) 1 App. Cas. 611, 620.
(7) (1880) 9 Q. B. D. 741.

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*H. P. Glover*, for the Liverpool Corporation, adopted the argument of the Attorney-General.

*H. A. Hill* in reply. It is said on behalf of the Minister of Health that the present procedure for confirming schemes is precisely on the same footing as the former procedure by provisional order. That is not so. Under the old procedure the provisional order embodied the scheme as a separate enactment which, of course, could never be questioned any more than any other statute. But the control of Parliament and the right of parties to go before a Parliamentary Committee and oppose the provisional order being now gone, it is important that the rights of individuals should be safeguarded and that all the conditions precedent to the making of an Order shall have been duly complied with. The Court is therefore entitled to inquire whether the making of this Order was within the competency of the Minister: see per Palles C.B. in *Reg.* v. *Pharmaceutical Society of Ireland* (1), where the precise effect of *Institute of Patent Agents* v. *Lockwood* (2) was considered, and the decision distinguished.

*Cur. adv. vult.*

April 10. The following judgments were read :—

Scrutton L.J. This was an appeal from an order of the Divisional Court, refusing (by a majority) to issue a writ of certiorari to move into the High Court, in order that it might be quashed as ultra vires, an Order made by the Minister of Health dated November 23, 1928, confirming a scheme entitled the Liverpool (Queen Anne Street) Improvement Scheme, 1928, as modified by the Order. The applicant was a Mr. Yaffe, and the ground of his application was that the scheme as submitted to the Minister was not a scheme within the powers conferred by Part II. of the Housing Act, 1925.

Before the Divisional Court the Attorney-General, for the Minister of Health, admitted that the scheme was ultra vires, so that if an application had been made for a writ of prohibition before the Order was made, it would have been successful: *Rex* v. *Minister of Health. Ex parte Davis.* (1) He, however, argued that by reason of s. 40, sub-s. 5, of the Housing Act, 1925, "The Order of the Minister when made shall have effect as if enacted in this Act," even if the proposed Order was originally ultra vires, when made by the Minister it had the effect of a statute, and could not be invalidated by an order of the Court. The Divisional Court, the Lord Chief Justice of England and Talbot J., accepted this view, Swift J. dissenting.

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(1) [1899] 2 I. R. 132.

(2) [1894] A. C. 347.

Before the Court of Appeal, the Attorney-General, having reconsidered the matter, did not admit that the proposed scheme and Order were ultra vires, and it is therefore necessary to consider this point, as to which we are bound by the principles laid down by this Court in *Davis's* case. (1) I refer, without repeating it, to the careful analysis of the provisions of the Housing Act, Part II., contained in Lord Hanworth's judgment. Shortly, the Act provides that where a housing area is in a condition dangerous to health, it may be cleared, and rebuilt or rearranged, that is, improved, by a scheme submitted to the Minister of Health and, after a public inquiry, after advertisement of the proposals, adopted with or without modifications and promulgated in an Order by the Minister of Health. In *Davis's* case (1) the Corporation of Derby submitted a scheme which did not include any specific plans for improvement or reconstruction but authorized the Corporation, having cleared the whole area, to "sell, lease or otherwise dispose of it, as the Council may think fit, or to appropriate or use it for any purpose approved by the Minister of Health." Lord Hanworth M.R. states the problem thus in *Davis's* case (2): "Do these proposals embody a good improvement scheme within Part II. of the Housing Act, 1925? It is claimed by the local authority that they do, although they provide for the clearance of the area only, and leave the disposal or use of the sites cleared to be determined at a later date"; and he answers the question thus (3): "After carefully surveying and examining the sections of Part II. of the Act, I can find

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(1) [1929] 1 K. B. 619.
(2) [1929] 1 K. B. 634.
(3) [1929] 1 K. B. 637.

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no warrant for holding that a scheme for mere demolition without any proposal for replacement or reconstruction, or for substitution, is within the Act," and (1): "For these reasons I have come to the conclusion that an 'improvement scheme' or 'scheme for the improvement of the area' must contain provisions for the user of the land where it has been acquired, and that a proposal to acquire sites in an area, leaving open the question as to its subsequent user till after the Minister has given expression to the purpose for which it shall be used, is not a scheme that complies with the Act." I understand this case to decide that a scheme to be within the Act, must, when advertised and inquired into in public, include a scheme with maps and particulars showing not only the land to be cleared, but specific proposals for its improvement and use when cleared, and must not merely leave the use to be made of the land cleared to the determination of the local authority and the Minister after the inquiry and Order. Further, that a scheme which does not comply with this essential condition is ultra vires the Act, and the local authority and the Minister can be prohibited from proceeding with it before the Order is made.

When the Minister of Health in 1919 under the Acts consolidated in 1925 issued a Manual on unhealthy areas stating the legal powers and duties of local authorities, he apparently took the same view. He stated at p. 46 that: "It is important that the statutory requirements should be carefully observed in order that no question may arise as to the validity of the proceedings." He pointed out at p. 41 that the scheme usually provided for: "(*c*) the proper laying out of the area with convenient streets and any necessary open spaces" and "(*d*) the erection on the area, or elsewhere, of sufficient dwelling accommodation in respect of persons of the working classes displaced by the scheme." At p. 55, he stated that the "maps" required by statute should show the proposals for dealing with the cleared area, "indicating new dwelling accommodation, street planning, open spaces or playgrounds or other intended developments," that the

(1) [1929] 1 K. B. 638.

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particulars required by statute should include "where the accommodation" (for the working classes displaced) "is to be provided"; that the estimates required by statute should show "the cost of the laying out and construction of new streets and the erection of new buildings." Also that, at the public inquiry, there will be considered "how far re-housing is to be effected within the area of the scheme (and on what part of the area); the accommodation to be provided; what roads and open spaces are to be provided, and where, in the area of the scheme."

The Liverpool proceedings started quite regularly. The medical officer made an official representation and report (A. Y. 1), and the Acting Director of Housing made a report setting out the details of the proposed lay-out, and a plan showing "the proposed lay-out for the redevelopment of the area" (Exhibit L. H. K. 1). On January 19, 1928, the Housing Committee had recommended to the Council that a scheme should be made and that the various officers be instructed to prepare a scheme, under which recommendation the officials had acted, and on February 16 the Housing Committee approved the reports and recommended the Council to adopt "the scheme now submitted" which will be found in Exhibit A. Y. 2, which bears date March 3, 1928. Clause 5 of this scheme does not adopt the plans and lay-out recommended by the Acting Director of Housing, but leaves the Corporation at large to prescribe what streets they liked, and free to put up such housing accommodation as they might think necessary, and to deal with any surplus lands as they thought fit. In other words, the scheme left the Corporation free to do what they liked with the land, but oddly enough gave an estimate of the expense of the Acting Director's plan, which was not part of the scheme. The Attorney-General told us that clause 5 had been put in from some form of provisional order used under the old procedure when Orders were confirmed by Parliament, without any appreciation of its relation to existing statutory requirements. The particulars required by the statute to be sent to the Minister of Health (A. Y. 2, p. 6) also included a very wide proposal, which left the hands of the Corporation absolutely free to do what they liked with the cleared site, including selling the whole of it. It ran thus: p. 6, No. (iv.): "After obtaining possession of the land the Corporation propose to remove the buildings standing thereon, and afterwards to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable, or to dispose of the site by a sale in fee simple or by building leases, as they may deem to be most advantageous."

The book of deposited plans did not include any map of the proposed lay-out; but a map of the area did include superimposed lines of the buildings proposed to be erected, but gave no indication of what was to be done with the land not covered with buildings, or as to streets. The advertisement of the inquiry referred to "A copy of the scheme accompanied by maps plans and estimates deposited in the Town Clerk's Office" which could be seen. These documents do not include any plan of the proposed lay-out. The Acting Director's plan could be seen in an adjoining office, but was not included in the scheme. When the inquiry took place, some owners of land interested tried to ascertain what was proposed to be done with the land. The shorthand note shows that the chairman of the Housing Committee protested that there was no plan of reconstruction embodied in the scheme, and the inspector said that details of reconstruction or any plan for reconstruction were not the subject-matter of the inquiry, and stopped any discussion of them, as did the chairman of the Housing Committee. Up to this point I am clearly of opinion that the proposed scheme, binding the Corporation to no particular scheme of lay-out and reconstruction, and leaving them at liberty to sell the whole area, was clearly not authorized by the Act, and could on the authority of *Davis's* case (1) have been restrained by prohibition.

Mr. Yaffe was an owner of land in the prescribed area, whose buildings and land it was proposed to take compulsorily,

(1) [1929] 1 K. B. 619.

only paying him the value of the land, and nothing for the buildings. He was therefore in my opinion entitled to a writ of prohibition ex debito justitiae, according to the decision of the Queen's Bench in *Reg.* v. *Surrey Justices* (1), delivered by Blackburn J., as being a party specially aggrieved, as distinguished from a mere member of the public not specially affected, as to whom the Court would use its discretion. He did not object at the inquiry, but another landowner did, and was suppressed by the inspector. After this inquiry, but before the decision of *Davis's* case (2) in the Divisional Court on December 18, 1928, the Minister made an Order dated November 23, 1928, confirming with modifications the Liverpool scheme. The scheme under the Order is exhibited in A. Y. 3; as compared with the Liverpool scheme exhibited in A. Y. 2 it is, as far as language is concerned, an entirely different document. In substance it still provides for no definite plan of lay-out. It does provide in cl. 5 that subject to the provision of necessary streets and approaches, the lands in the scheme shall be used for the purpose of re-housing, though it says nothing about playgrounds or open spaces. But it refers all plans of houses or streets to plans to be approved by the Minister: in other words, it does not sanction any particular plan of reconstruction, into which there has been a public inquiry.

In my opinion, on the principles laid down in *Davis's* case (3), such a scheme does not comply with the provisions of the Housing Act, and the Corporation and the Minister before the Order was made could have been prohibited from proceeding with it, as a scheme ultra vires his powers as conferred by the Act. One ventures to hope that local authorities and the Ministry will note and comply with the views of the Courts as to these limitations of their powers under the existing Act.

*Davis's* case (2) was decided in the Court of Appeal on March 13, 1929, and on March 28, 1929, Mr. Yaffe by counsel applied to the Divisional Court for a rule nisi for a writ of certiorari to remove into the Court the Liverpool Order that

(1) L. R. 5 Q. B. 466. (2) [1929] 1 K. B. 619.

it might be quashed on various grounds alleging that it was beyond the powers conferred on local authorities by the Housing Act. I can see no ground for any suggestion of delay in the application which could be an answer as against a person specially aggrieved entitled to the writ ex debito justitiae.

As in my view the scheme could have been prohibited before the Order was made, a position which though contested in this Court had been admitted before the Divisional Court, we are then faced with the question of far-reaching constitutional importance on which the Divisional Court disagreed—whether a scheme admittedly unauthorized by the Act, can be made law by the Minister by an Order which under s. 40, sub-s. 5, of the Housing Act "shall have effect as if enacted in this Act." One may test the question in this way: s. 40, sub-s. 3, provides that the Order shall make no addition to the lands proposed in the scheme to be taken compulsorily. Suppose that the Minister by Order modifies the scheme so as to increase the lands to be taken compulsorily, a thing which s. 40, sub-s. 3, forbids him to do. Does s. 40, sub-s. 5, make such an Order valid, because if enacted in the Act, it might as a special legislative provision prevail over a general legislative prohibition contained in the same Act?

The Parliamentary history on this particular subject begins in 1890 (53 & 54 Vict. c. 70, ss. 8, 39), which provided that an improvement scheme prepared by the local authority might be confirmed after local inquiry by a Minister, by a provisional order which was not to be of any validity till confirmed by Parliament, after persons objecting had been heard before a Parliamentary Committee. Certain expenses incurred by the confirming authority, it might order to be paid by the local authority, and "any Order made by the confirming authority in pursuance of this section may be made a rule of a superior Court, and be enforced accordingly." By s. 39 also, a scheme for reconstruction, if not made by agreement, shall be effected by Order, which if not petitioned against shall come into operation, "and have effect

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as if it were enacted in this Act," but if petitioned against within two months, shall only be provisional until it is confirmed by Act of Parliament.

The Act of 1903 by s. 5 removed the necessity of obtaining Parliamentary sanction where land was not to be taken compulsorily, or where the taking being compulsory the confirming authority were satisfied that the draft Order had been notified to persons affected, and published, and no petition had been received against it. In such a case the confirming Order was to have the same effect as if it had been confirmed by Parliament.

By the Act of 1909, the provisions of s. 5 of the Act of 1903 were repealed, and the Local Government Board were authorized by Order to sanction reconstruction schemes and authorize compulsory purchase of land, without confirmation by Parliament, in spite of the provisions of s. 39 of the Act of 1890.

This history shows a gradual increase in the powers of the Ministry, and greater freedom from the control of Parliament. The strongest clause is that repeated in Schedule III, s. 2, of the Housing Act, 1925, from Schedule I., s. 2, of the Housing Act, 1909. That clause runs: "Shall, save as otherwise expressly provided by this schedule, become final and have effect as if enacted in this Act; and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with, and that the Order has been duly made and is within the powers of this Act." This apparently is intended to prevent any question of ultra vires being raised however flagrantly the Order in question may exceed the powers given by the Act.

So far as I have examined the legislation, there are many variations in the form in which a provision that the Order of the Minister shall have effect as if enacted in the Act, may be made. Sometimes the Order is only provisional, until confirmed by Parliament. Sometimes it is to be laid on the table of both Houses for a given period, during which it may be annulled by resolution of one or both Houses.

Sometimes, if not objected to within a certain time, it cannot be questioned afterwards. Sometimes it is followed by the very wide words contained in Schedule III., s. 2, of the Act now under consideration. Again, as to subject-matter, sometimes the Order is merely to provide rules of procedure for carrying out a process which Parliament has ordained, but for which it has provided no machinery, leaving this to be provided by a Minister. Sometimes the Order is to affect rights of property in individuals. Each Act containing such a clause must be considered on its own object and language.

The present Act enables a Minister to take away the property of individuals without compensation on certain defined conditions. In my view those conditions must be strictly complied with, and only the very clearest words can give final validity to an Order which does not comply with the prescribed statutory conditions. The Attorney-General went so far as to argue that though the Order violated all the statutory conditions; was made without a scheme, or advertisement or public inquiry, once the Order was made, it had the effect of a statute. I cannot agree. In my view an Order which goes beyond the statutory conditions under which alone it can be made, an Order which for that reason the Minister could be prohibited from making, if he announced his intention of making it, is not an Order which when made can by reason of s. 40, sub-s. 5, have statutory effect.

It is said: "But what meaning do you give to s. 40, sub-s. 5," if you limit it to Orders authorized by the statute? It is merely tautological and superfluous; the Order by reason of the rest of the statute has already statutory authority. But I find no reason to assume that the framers of this Act objected to tautology. The Attorney-General argued that on the true meaning of the words in s. 40, sub-s. 5, no question could be raised whether the requirements of the Act have been complied with, or whether the Order had been truly made and was within the powers of the Act. But yet in Schedule III., s. 2, the draftsman and Parliament have thought it necessary to add to the words of s. 40, sub-s. 5, the words I have cited. Am I to assume that this is mere tautology; or is not the better view that the words of s. 40, sub-s. 5, have not the meaning contended for, without the added words? I decline, without clear words or authorities clearly binding me, to hold that when Parliament delegates to a Minister the authority to deprive citizens of property without compensation on certain defined conditions, Parliament has allowed him to make such an Order without complying with those conditions, so that his Order shall have the effect of unquestioned law.

I have considered the authorities cited to us on different Acts, and as to different subject-matters. The case which has given me most anxiety is *Institute of Patent Agents* v. *Lockwood.* (1) The Patents, &c., Act, 1883, established a register of patent agents, but contained no provisions as to the nature of the register or how it was to be worked or paid for. The Board of Trade were empowered to make general rules as they might think expedient subject to the provisions of the Act for regulating the practice of registration under the Act, which should be of the same effect as if they were contained in the Act, provided that if either House of Parliament within forty days after the rules had been laid before the House should resolve that the rules or any of them should be annulled, the annulled rules should be of no effect. The rules imposed on every patent agent on the register an entrance fee and an annual fee. A clause in the Act provided that any person who had bona fide practised as a patent agent before the Act should be entitled to be on the register. Such a person declined to pay the fees, and was not put on the register. He continued to practise as a patent agent, and it was alleged that he became liable on summary conviction to a fine of 20*l.* Instead of proceeding summarily, the Court of Session was asked to make a declaration of illegality against him and to grant an interdict. This they declined to do, partly on the ground that the institution of fees by rules was ultra vires, partly on the ground that declaration and interdict were not the proper remedy; summary proceedings were. The House of Lords affirmed this decision, but on

(1) [1894] A. C. 347.

partly different grounds. They held: (1.) that the provision of funds for working the register was intra vires the Act, and that the particular agent could only go on the register on complying with the rules; (2.) that the Court of Session was right in holding that the proper remedy, if any, was not application to them for declaration and interdict, but summary proceedings. It was therefore unnecessary for the House of Lords to determine what would be the position if the rules had been ultra vires and had gone beyond establishing and regulating the register. But as I understand the case, some of their Lordships did express an opinion that in that Act, if the rules had been ultra vires, but had not been annulled by Parliament, which could annul them, there would be no remedy to the person aggrieved. In a similar case of insurance regulations, with provisions that they should have the effect of a statute unless they were annulled by Parliament within twenty-one days after the rules were laid before them—see *Glasgow Insurance Committee* v. *Scottish Insurance Committees* (1)—the Scottish Courts followed the opinions expressed in *Lockwood's* case. (2) On the other hand, in a case involving the question whether a requirement of service as apprentice was ultra vires the powers of a rule-making authority, the Irish Court in *Reg.* v. *Pharmaceutical Society of Ireland* (3) declined to follow the reasoning in *Lockwood's* case (2), Palles C.B. and O'Brien J. giving detailed though different reasons, to which I refer. The English decision of *Reg.* v. *Hastings Board of Health* (4), though followed by the Irish Court of Appeal in *Ex parte Kingstown Commissioners* (5), appears to me of very little authority since the decision of the English Court of Appeal in *Rex* v. *Electricity Commissioners.* (6) The decision and reasoning in the latter case and in *Davis's* case (7) seem to me quite inconsistent with the validity of an Order made by a Minister in excess of his statutory powers, whether such validity is tested by writ of prohibition before he makes the Order, or by writ of certiorari after he has made an Order admitted to be made in excess of his statutory powers and without the necessary statutory preliminaries.

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(1) 1915 S. C. 504.
(2) [1894] A. C. 347.
(3) [1899] 2 I. R. 132.
(4) (1865) 6 B. & S. 401.
(5) (1885) 16 L. R. Ir. 150; (1885) 18 L. R. Ir. 509.
(6) [1924] 1 K. B. 171.
(7) [1929] 1 K. B. 619.

In my opinion the writ of certiorari should go to the Minister of Health to bring up the Order in question, to be quashed as in excess of his jurisdiction. The Order of the Divisional Court should be set aside, and the Minister be ordered to pay the costs of the applicant here and below. The Corporation of Liverpool should have no costs from anybody. They are a proximate cause of the error in this case, and I am surprised that they were given any costs below.

No doubt this case will be taken further, and it is very desirable that the highest tribunal should express an opinion on the legal position. But as a matter of constitutional importance, I hope that Members of Parliament and Ministers and Parliamentary draftsmen will consider whether this form of legislation is really satisfactory. It may be convenient to Ministers not to have to consider carefully whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute. Parliamentary draftsmen may have got into the habit of inserting this kind of Star Chamber clause either on the instructions of the Minister or as a matter of habit without his instructions. Members of Parliament may not trouble to consider what the sections to which they are giving legislative authority really mean, but simply follow the authority of the Minister and the Government Whip. But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain statutory conditions are observed, it should then pass clauses which, it may be contended, allow their delegates to contravene these conditions, and make ultra vires orders which cannot be controlled by the Courts which have to administer the laws of the land.

GREER L.J. On November 23, 1928, the Minister of Health made an Order which by its terms purports to be a confirmation of a scheme dated March 7, 1928, prepared by the Council of the City of Liverpool under Part II. of the Housing Act, 1925, for the improvement of the area therein described with modifications stated in the schedule to the Order. A Mr. Yaffe, being a person whose property was affected by the Order, applied to a Divisional Court of the King's Bench Division for a writ of certiorari to remove the Order into Court and quash it. He obtained a rule nisi under which cause was shown by the Attorney-General on behalf of the Minister, and on January 14, 1930, the Divisional Court, by a majority, discharged the rule with costs. The applicant now appeals from that Order and asks this Court to say that the rule ought to be made absolute.

The appeal raises an important question as to the effect of s. 40, sub-s. 5, of the Housing Act, 1925, as well as other less important questions of principle. Broadly` speaking, the relevant sections of the Act (15 Geo. 5, c. 14) provide for the preparation of a scheme for the demolition of the houses, courts and alleys in insanitary areas, and the rearrangement and reconstruction of streets and houses within such areas, and for a petition to the Minister of Health for an Order confirming the scheme which the Minister can only make after ordering a local inquiry and being satisfied on receiving the report of the Commissioner holding the inquiry that the circumstances are such as to justify the making of the scheme and its carrying into effect absolutely or subject to modifications. The Minister's Order may incorporate the provisions of the Lands Clauses Act so as to bring into effect the compulsory acquisition of the property to be demolished. The Act also contains provisions as to the right of compensation which to some extent depends upon what the scheme provides with regard to the use to be made of land after demolition of the property. By s. 40, sub-s. 5, it is enacted that "The Order of the Minister when made shall have effect as if enacted in this Act." The contentions of the appellant were that the scheme prepared by the local authority was not a scheme which was authorized by the Act, that the local authority were therefore not in a position to present any petition to the Minister asking for an Order, that the petition was not accompanied by a copy of anything that could be described as a scheme within the Act, that the Minister was therefore not entitled to consider the petition or make any Order for carrying out the scheme either with or without modifications, and that inasmuch as there never was any scheme within the meaning of the Act presented for his consideration his power to make an Order never arose, and that as he could not make an Order at all he could not make one which by reason of s. 40, sub-s. 5, should have effect as if enacted in the Act of Parliament.

It was contended for the Minister that when the facts are properly investigated we ought to hold that a proper scheme had been prepared by the Council, and that therefore the appellant's contentions failed ab initio. It was contended, secondly, that whether a scheme within the meaning of the Act had or had not been prepared by the Council, still, once the Minister had made an Order, that Order by reason of s. 40, sub-s. 5, obtained the binding force of a clause in an Act of Parliament; and it was contended, thirdly, that the applicant in this case had so acted that a Court ought not to grant him relief by certiorari.

In order to consider these questions it is necessary to state the facts with regard to the preparation of the scheme by the Council, and the nature of the scheme sent by the Council to the Minister for his consideration. By ss. 35 and 36 of the Housing Act the local authority are to be set in motion by an official representation made by their medical officer. Such a representation was duly made by the medical officer of the City of Liverpool on February 15, 1928. It was accompanied by a report of the Acting Director of Housing, which set out a draft scheme for the consideration of the Housing Committee of the Council in the first instance, and impliedly for the consideration of the Council after it had been dealt with by the Housing Committee. The draft scheme suggested by the Acting Director of Housing referred to a number of plans which showed the property which it was proposed to demolish, and which also contained what for convenience are called "lay-out" plans, showing the parts of the property on which it was proposed to build, and the character of the buildings to be erected on the site, which consisted in the main of dwellings for the working classes, and the parts which it was intended to leave as open spaces enclosed by the houses. It was rightly conceded by the appellant that if the draft scheme suggested in the Acting Director's report had been adopted by the Council it would have been a proper scheme within the statute, and it could not have been held to be ultra vires of the Corporation before confirmation, or of the Minister after confirmation. The Housing Committee held a meeting on February 16, 1928, at which they passed a resolution approving the report of the Acting Director and recommending a scheme. It is not quite clear what was the scheme that the Housing Committee approved on February 16. It was said by the appellant that what they approved was the scheme which was afterwards adopted by the City Council. It was contended by the Attorney-General that what they did approve was the draft scheme of the Acting Director, but I do not think it is possible on the evidence before the Court, or necessary, to decide what scheme it was that the committee approved, because at some time or other a document was prepared by some one in the town clerk's office as a scheme which was not in accordance with the draft scheme of the Acting Director. The question came before the City Council on March 7, 1928, and whatever may have been the state of mind of the members of the Council assembled on that date, there can be no doubt that what they did was to adopt the document which had been prepared in the Town Clerk's office, and not the draft scheme prepared by the Acting Director. The scheme which was actually adopted appears in a document, to which the seal of the Corporation was affixed, witnessed by the Lord Mayor and the Town Clerk, which is described as a "scheme made by the Lord Mayor, Aldermen and Citizens of the City of Liverpool, acting by the Council as the local authority under Part II. of the Housing Act, 1925, for the improvement of an unhealthy area within the City of

Liverpool." The scheme so authenticated was sent by the Corporation as local authority to the Minister for confirmation, with the petition mentioned in s. 40 of the Act, and it does not seem possible now to contend that there was any other scheme which the Minister was entitled to consider. The alleged scheme provided that it should be cited as the Liverpool (Queen Anne Street) Improvement Scheme, 1928. It stated in para. 2 that the plans referred to meant the plans "which accompany this scheme." Only two plans accompanied the scheme, one being a map of the City of Liverpool, and the other being a plan of the area on which it was proposed to demolish the buildings, the great bulk of it being coloured red, which indicated insanitary property, and some portions coloured blue, which indicated property which was not in itself insanitary, but as to which under the Act a different measure of compensation was payable to the persons interested. After defining the area, the alleged scheme said, in para. 4: "The Corporation may enter upon and take compulsorily and deal with for the purpose of this scheme all or any of the lands referred to in this scheme and coloured pink and blue on the said plan." This obviously refers not to the map of Liverpool, but to the other plan mentioned above. Except in the definition clause no plans are referred to other than this one.

Clause 5 of the alleged scheme is in the following words: "(5.) After obtaining possession of the land authorised to be taken by this scheme the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working class as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased, or otherwise disposed of, as the

Corporation may think fit." In accordance with instructions received from the Minister of Health, particulars of the alleged scheme were sent to the Ministry, along with the scheme. Sect. 38 of the Act requires that an improvement scheme shall be accompanied by maps, particulars and estimates. The alleged scheme and the particulars which accompanied it are set out in a document which is identified in the evidence as A. Y. 2. For convenience the alleged scheme with the particulars is hereinafter referred to as scheme A. Y. 2. The particulars are in some respects inconsistent with the alleged scheme. Para. (iii.) of the particulars says this: "It is intended to provide accommodation for such number of those persons of the working class who will be displaced in the area affected by the scheme in such place or places either within or without the limits of the said area as the Ministry of Health, being the confirming authority within the meaning of the above Act, may require." Then para. (iv.) says: "After obtaining possession of the land the Corporation propose to remove the buildings standing thereon and afterwards to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable, or to dispose of the site by a sale in fee simple or by building leases, as they may deem to be most advantageous." The alleged scheme was duly advertised and a copy thereof was deposited for inspection and notices were duly given as required by s. 39. Thereafter scheme A. Y. 2 was sent to the Minister of Health in a letter dated April 4, 1928, which enclosed the following documents: (1.) official representation (two copies); (2.) reports of officials (two copies); (3.) improvement scheme (two copies)—that is A. Y. 2; (4.) particulars and estimates of cost of carrying the scheme into effect (two copies)—that is to say the particulars of which I have read two paragraphs; (5.) book of plans (two copies)—that is to say the two plans I have already referred to; (6.) book of reference (two copies); (7.) report of the medical officer of health as to rates of mortality, etc.; (8.) statement as to the number of occupants in each house, the weekly rents paid, and the occupation and places of employment of the tenants; (9.) and (10.) declarations and exhibits including copy notices served on owners and occupiers, and form of reply.

None of the plans which had been prepared by the Acting Director of Housing were sent to the Minister before he ordered the local inquiry. After receiving scheme A. Y. 2, a plan of Liverpool, and a plan of the area showing the insanitary property in red and the other property included in the scheme in blue, the Minister ordered a local inquiry. This inquiry was held by Mr. H. A. Chapman in Liverpool on May 1, 2 and 3, when the Liverpool Property Owners' Association and a number of individual owners in or near the area, of whom the appellant was one, attended by their counsel or solicitors or in person to oppose or criticize the scheme. It appears from the extract from the shorthand note of the hearing that the principal witness for the Corporation disclaimed any idea that the Acting Director's plans were any part of the scheme, and that he regarded it as useless and unnecessary to put any lay-out plans in a scheme before it was sent to the Minister for approval. The inspector appears to have thought that all the Minister required to know was the number of occupiers to be provided for in the rebuilding. It is worthy of note that scheme A. Y. 2 gives no information on this point. It merely provides that the Corporation shall appropriate parts of the area, other than those used for widening streets, for the accommodation of such number of persons of the working class as in the opinion of the Corporation may require such accommodation. In the particulars the Corporation state that it is their intention to provide such accommodation within or without the limits of the area as the Minister may require.

It seems to me quite impossible for us to hold that the Acting Director's plans formed any part of the alleged scheme sent to the Minister on the strength of which the inquiry was ordered. It is plain that unless we are prepared to disregard the decision of the Court of Appeal in *Rex* v. *Minister of Health, Ex parte Davis* (1) we must hold that a writ of prohibition would have been granted on application by Mr. Yaffe before the Minister confirmed the Order.

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(1) [1929] 1 K. B. 619.

The second contention of the Attorney-General raises a question of some difficulty. I propose to deal with this question in the first place by considering the provisions of the statute, and in the next place by considering the principal authorities relied on by the Attorney-General in opposing the appeal.

It is clear that if an improvement scheme is duly initiated, made and approved, the property of owners in the area of the scheme may be taken from them without their consent. They ought not to be dispossessed unless the conditions laid down in the statute have been complied with. The effect of s. 35 is that the local authority cannot begin to act until they have received the official representation therein referred to. In my judgment in *Davis's* case (1) I held that the section contains a definition of an improvement scheme as a "scheme for the rearrangement and reconstruction of the streets and houses in the area or some of such streets and houses." As I read his judgment the Master of the Rolls agreed with this view. By saying that this was a definition of an improvement scheme, I did not, nor do I, mean a complete definition in the scientific sense. What I mean is that the words of the section indicate what at the very least must be provided for in the scheme. The scheme as sent did not provide for the rearrangement of either the streets or the houses. I do not think that the statute requires that there should be a detailed plan showing the character of the houses and streets as they are proposed to be after reconstruction. I think this part of the Act would be sufficiently complied with if the scheme showed, by reference to a plan or by words, which part of the area it was intended to utilize for the building of houses, and in a general way the rearrangement of the streets. If the scheme had been stated to be a scheme to demolish the existing houses and to rearrange the streets as shown on the plan H. A. C. 2 sent after the inquiry to the Minister, and to build houses on the parts of the area enclosed by black lines, and had

(1) [1929] 1 K. B. 619.

further stated that proper sanitary arrangements would be provided, this would have been a sufficient compliance with the Act if the scheme was accompanied by particulars describing in a general way the kind of houses it was proposed to erect, and estimates as required by s. 38. Sect. 39 provides for the local advertisement of the making of the scheme, and the naming of the place where a copy of the scheme can be seen, and for notices to be sent to owners and occupiers. Sect. 40 provides what is to happen "upon compliance with the foregoing provisions with respect to the publication of an advertisement and the service of notices." In order to state my views as to the true interpretation of the section, I find it necessary to read the whole of the section. [The Lord Justice read the section and continued :] It is clear from sub-ss. 2 and 3 that no power is given to the Minister to confirm the scheme unless he has (1.) received a copy of something that is a scheme within the meaning of the Act, (2.) considered the petition, (3.) caused a local inquiry to be held, and (4.) is satisfied on the report as to the matters mentioned in sub-s. 3. If he is so satisfied then he may by Order confirm the scheme with or without modifications. It was argued on behalf of the Minister that if none of these things had happened, the Minister could make an Order which when made would have effect as if enacted in the Act. This would mean that owners might be dispossessed of their property merely by the ipse dixit of the Minister ; that the provisions put in the Act for the protection of owners and ratepayers might be wholly disregarded. I do not think this is the meaning of s. 40, sub-s. 5. In my judgment the statute provides for conditions precedent to the making of an Order, and it is only an Order made after compliance with these conditions precedent that has effect as if enacted in the Act. It is to be observed that the words of the sub-section are "The Order," not any Order made by the Minister. This is all the more significant when we find in Schedule III., with regard to another kind of Order confirmed by the Minister, these express words : "The confirmation by the Minister shall be conclusive evidence

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that the requirements of this Act have been complied with, and that the Order has been duly made and is within the powers of this Act." Where the legislature intended that the Order should be conclusive evidence that the requirements of the Act have been complied with they have said so expressly. It seems to me reasonable to conclude that s. 40, sub-s. 5, which contains no similar provision, has not the same effect as if it did contain similar words. I read "the Order" as a reference to some Order made after the statutory provisions with regard to the making of a scheme, its publication, presentation for confirmation and the local inquiry into the scheme have been complied with. It is said that sub-s. 5 is not required to validate an Order properly made, and that it means that once the Minister has made an Order you cannot inquire whether it is ultra vires or not, because it is to have effect as if it were contained in the Act. The doctrine of ultra vires, it is said, has no application to clauses in Acts of Parliament. This sort of argument is beside the question. The question is whether the Order in this case ever became a statutory Order. If the Minister had, in the events that happened, no power to make any Order at all, his delegated power of legislation never came into existence. No Order was ever made on which sub-s. 5 could operate. By so holding we do not, as is suggested, deprive sub-s. 5 of any meaning. If the Minister after the events have happened which entitle him to make an Order, inserts in the Order something which apart from sub-s. 5 he would not be entitled so to insert, sub-s. 5 might prevent any one from arguing that his Order was bad, but sub-s. 5 does not in my judgment prevent any one from successfully contending that the occasion for making an Order never arose at all.

I now proceed to consider whether the decisions relied upon by the Attorney-General preclude this Court from deciding that the confirming Order of the Minister of Health was null and void because the statutory conditions upon which he is authorized to make an Order had not been performed. I do not think any of the cases relied upon have that effect. The principal decision relied upon was that of the House of Lords in *Institute of Patent Agents* v. *Lockwood.* (1) The question raised in that case was as to the validity of a rule made by the Board of Trade under the powers given to them by s. 1, sub-s. 2, of Patents, &c., Act, 1888. The sub-section is as follows: "(2.) The Board of Trade shall, as soon as may be after the passing of this Act, and may from time to time, make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of s. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." And by reference to an earlier Act the rules were to be of the same effect as if contained in the Act subject to their being laid before both Houses of Parliament and not being annulled by a resolution of either House. It is to be observed that the power to make the rules is described in the second sub-section as a power to make such general rules as in the opinion of the Board were required to give effect to the section. There were no conditions to be performed before the Board could take into their consideration the question whether any and what rules should be made. If an attack was made upon the rules as being ultra vires it could only be made by looking at the rules themselves, and deciding whether the words used in the rules were or were not authorized by the Act of Parliament, but inasmuch as the rules when made were to have the same effect as if they were contained in the Act, the claim that they could be objected to as ultra vires was inadmissible, inasmuch as, once made, they became part of the Act of Parliament. You cannot, of course, contend that one section of an Act of Parliament is ultra vires because it is inconsistent with some other section of the Act. The case seems to me no authority for the proposition that where a statute lays down that certain conditions must be complied with before a rule or order is made, the Courts are precluded from saying that the order or rules are inoperative because the power to make them never arose. If, as happened in the present case, the conditions precedent to the making of an Order by the Minister have not been complied with, the

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(1) [1894] A. C. 347.

Order of the Minister is not, in my opinion, such an Order as is said by s. 40, sub-s. 5, of the Housing Act, 1925, to have effect as if enacted in the Act. We are not in this case inquiring into the validity of a section in an Act of Parliament. What we are saying is that the Order of the Minister was not an Order such as under the Act received the status of a clause in an Act of Parliament.

The Scottish case to which our attention was called, *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners* (1), depends upon similar considerations to those which applied in *Lockwood's* case. (2) By s. 65 of the National Insurance Act, 1911, it was provided that the Insurance Commissioners might make regulations for carrying the first part of the Act into effect, and any regulations so made should be laid before both Houses of Parliament as soon as might be after they were made, and should have effect as if enacted in that Act, but His Majesty in Council might annul the regulations on an address being presented by either House of Parliament within the time specified in the section. In that case also, in order to ascertain whether the regulations were in excess of the power to make regulations, one could only look at the contents of the regulations and the statute. In the Court of Session it was held that the Court ought not to interfere when the making of a regulation was threatened, inasmuch as the regulations once made, if not annulled, would have the same effect as if they were in the Act of Parliament. "The regulations, in short, when issued, become additional clauses in this Act of Parliament": per the Lord President. (3) And it was held that the complainants' only remedy was to get one or other of the Houses of Parliament to annul the regulation. I think that case has no bearing upon the question which we have to decide in the present case, as the statute under consideration did not provide for any condition precedent to the making of regulations.

Some cases were also relied upon which arose out of claims by public officials to the benefit of statutory provisions such

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(1) 1915 S. C. 504.

(2) [1894] A. C. 347.

(3) 1915 S. C. 510.

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as are now contained in the Public Authorities Protection Act. These decisions do not seem to me to be in pari materia with the present case. Acts which the officials did which were in accordance with their powers needed no protection, and the various statutory provisions relied upon were obviously intended to protect officials who, acting in good faith, and in the honest belief that they were carrying out their statutory duties, make a mistake, and do something in pursuance of their statutory duties which is not within the statutory powers conferred upon them : see per Scrutton L.J. in *Scammell (G.) & Nephew, Ld.* v. *Hurley.* (1). I can find no assistance myself from these cases in interpreting s. 40 of the Housing Act, 1925.

I also think that if we dismissed this appeal we could only do so by refusing to act upon the authority of *Davis's* case. (2) "The writ of prohibition," as is stated in Short and Mellor's Crown Office Practice, 2nd ed., p. 252, "is a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." No doubt in origin a writ of prohibition was a writ directed to Courts of law, but as was pointed out in *Rex* v. *Electricity Commissioners* (3), the use of the writ has been extended from time to time to certain public bodies exercising powers which affect local individual rights, but in every case the question necessarily is : Has the official person or body against whom the writ is sought power to do that which he or they are proposing to do ? If they have power to do it, no writ will issue. It seems to me quite clear that it was involved in the decision in *Davis's* case (2), that upon the facts of that case the Minister had no power to make any Order confirming the alleged scheme, and it seems to me to follow from the decision that if he had made an Order, the Court must have held that it was beyond his jurisdiction to make it, and on

(1) [1929] 1 K. B. 419. (2) [1929] 1 K. B. 619.
(3) [1924] 1 K. B. 171.

application for a writ of certiorari the applicant would have been entitled to have the Order quashed. If it be true to say that the Minister has power in the absence of the official representation for the preparation of a scheme for the rearrangement and reconstruction of streets and houses, in the absence of the making of such a scheme, in the absence of an advertisement of such a scheme, in the absence of a petition accompanied by such a scheme, to add a clause to an Act of Parliament, then the Court could not issue a prohibition against him, as they would then be prohibiting him from doing that which he had power to do.

It remains for me to consider the arguments of the Attorney-General which were based on the history of the statutes with regard to improvement schemes. In the Housing of the Working Classes Act, 1890, there were provisions similar though not identical with those contained in the 1925 Act with regard to the way in which an improvement scheme should be made by the local authority, as to what it should contain, and as to its confirmation after publication of advertisements and the service of notices. Power was given by s. 8, on compliance with the provisions as to the publication of advertisements and service of notices, to the local authority to present the petition in London to the Secretary of State, elsewhere to the Local Government Board, for confirmation. The confirmation was to be made by provisional order, and by s. 8, sub-s. 6, the provisional order was not to be of any validity until confirmed by Act of Parliament. It is beyond dispute that if a scheme made under this Act exceeded the powers given to the Council, or was made without the necessary advertisements or other preliminary steps provided for in the Act, but was inserted in a provisional order and that provisional order was sanctioned by an Act of Parliament, the scheme would then have statutory authority, not because the provisional order was rightly made, but because any law made by Act of Parliament is a law whether it ought to have been made or whether it ought not to have been made. By the Housing of the Working Classes Act, 1903, it was provided that an Order of a confirming authority made under the principal Act, that is the Act of 1890, should have effect without confirmation by Parliament except in certain cases mentioned in s. 5, and it was further provided by s. 5, sub-s. 3, that the making of an Order which took effect under that section without confirmation by Parliament should have the same effect as the confirmation of the Order by Act of Parliament. The Housing and Town Planning Act, 1909, does away with the exceptions. The Act of 1925 substitutes the Order of the Minister of Health for that of the Secretary of State or Local Government Board. Therefore it was argued that the Minister of Health obtained the same power to validate an Order as he had under the Act of 1890. In my judgment this argument is not entitled to succeed. The validity of an Act confirming the provisional order which would otherwise have been bad does not arise by reason of any provision in the Act of 1890. The reason why an Order which would be otherwise bad would be validated by an Act of Parliament arises from the accepted doctrine that Parliament is supreme. It could pass an Act putting into operation a scheme whether the preliminary steps provided for in the Act of 1890 had or had not been taken, and whether there had or had not been any provisional order, but I do not read the Act of 1903 as giving to the confirming authority all the legislative powers that Parliament has in relation to the improvement of insanitary areas. I read the Act of 1903 in the same way that I read the Act of 1925. I think it confers on the confirming authority power to legislate by Order only after the preliminary steps have been taken which the Act requires to be taken before the confirming authority can take into consideration the question whether a scheme has been put forward under the Act for their confirmation. Under the Act of 1903, as under the Act of 1925, I think there were conditions precedent to the exercise of legislative power by the confirming authority, and if those conditions had not been performed the confirming authority had no power to make an Order which would have effect as if enacted in the Act.

For the reasons I have stated I am of opinion that the Order of the Minister was made without jurisdiction, and that it never obtained the force of a clause in an Act of Parliament. I agree with the dissenting judgment of Swift J.

With regard to the respondent's third contention, I am satisfied that there was nothing in the conduct of the complainant Yaffe that would justify the Court in refusing him relief to which as an owner of property affected by the Order he is entitled ex debito justitiae.

In my judgment the appeal should be allowed, and the order nisi made absolute, with costs here and below.

Slesser L.J. This is an appeal from a refusal of a Divisional Court of the King's Bench Division to make absolute an order for a writ of certiorari to remove into that Court an Order made by the Minister of Health dated November 23, 1928, purporting to confirm a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme Order, 1928, together with particulars prepared by the Council of the City of Liverpool as modified and set out in the Order of the Minister.

The facts of this case are as follows: By s. 35, sub-s. 1, and s. 36 of the Housing Act, 1925, an official representation may be made to the local authority by the medical officer of health that an area, on various grounds stated in s. 35, is an unhealthy area and, acting under this section, on January 18, 1928, Mr. Mussen, the medical officer, duly made such an official representation, to which he attached a schedule containing particulars of the Queen Anne Street unhealthy area. On January 19 the Housing Committee of the Council considered the official representation and made the following recommendations to the Council: "That it be recommended to the Council that the Council, having taken into consideration the official representation of the Medical Officer of Health, dated January 18, 1928, and being satisfied of the truth thereof and of the sufficiency of their resources, declare that the area described in such representation is an unhealthy area, and that an improvement scheme ought to be made in respect of such area," and "That it be recommended to the Council that the Town Clerk be instructed to prepare a draft scheme, and take all other requisite steps to carry the same into effect under, and in accordance with, the provisions of Part II. of the Housing Act, 1925, and that the Land Steward and Surveyor and the Acting Director of Housing prepare the necessary plans, particulars and estimates." On February 1 the Liverpool City Council confirmed the recommendation of their Housing Committee and resolved that an improvement scheme should be made in respect of the Queen Anne Street area.

Sect. 38 of the Act of 1925 provides the necessary machinery for the constitution of an improvement scheme and lays down the requisites for such a scheme, to which I shall have occasion subsequently to refer. On February 16 there were submitted to the Housing Committee various reports of the Medical Officer of Health, the Acting Director of Housing, the land steward and surveyor and the Town Clerk, together with five plans, which showed, as to plan one, the insanitary property, which was coloured red, and the land and buildings which the Acting Director indicated were essential to include for the efficiency of the scheme, and a certain further area in Holly Street—a site on which buildings could be proceeded with at an early date which was outside the Queen Anne Street Area—all of which were coloured blue. Plan No. 2, showed the area in the scheme which would be cleared and redeveloped for housing purposes and the position of new dwellings, indicated in a different tint, to which was added this note: "Plan No. 2, together with Plan No. 1, will accompany the particulars to be forwarded to the Minister of Health in connection with the official representation scheme." Plan No. 3 showed the lay-out proposed for the redevelopment of the area in clearer form. Plan No. 4 showed the existing buildings on the area, and Plan No. 5 the principal elevations of the new buildings. All these matters were before the Housing Committee on February 16, when the following resolutions were carried: (1.) "That the reports be approved." (2.) "That it be recommended to the Council that the improvement scheme under Part II. of the Housing Act, 1925, now submitted for the improvement of the Queen Anne Street unhealthy area, together with the plans, particulars and estimates relating to the said scheme, be, and the same are, hereby made and adopted, and that all necessary steps be taken to obtain confirmation thereof."

On March 7, 1928, the Council, under their common seal, made what is described as an improvement scheme to which they annexed certain particulars, and after public inquiry duly forwarded their scheme to the Minister. Despite the statement of the Acting Director of Housing that plans Nos. 1 and 2 would accompany the particulars to be forwarded to the Minister of Health, no such plans were annexed to the scheme made by the Council. The only plan which accompanied the scheme, as settled by the Council, was a plan showing the area which was coloured pink and certain other lands coloured blue said to be included for the purpose of making the scheme efficient, so that no plans showing the lay-out were before the Minister.

In the Divisional Court the learned Attorney-General, on behalf of the Minister of Health, admitted that this purported scheme of the Council which was sent to the Minister on April 4, was void and of no effect, and, at that stage, the Attorney-General admitted that, if a writ of prohibition had been applied for before the Minister made what purports to be his Order confirming the scheme on November 23, 1928, on the authority of *Rex* v. *Minister of Health. Ex parte Davis* (1), there would have been no defence. But the learned Attorney-General in this Court has sought to distinguish this case from *Davis's* case (1) on the question of the validity of the Council's scheme, and withdraws the admission which he made in the Court below. He still concedes that the scheme, as such, sent to the Minister was bad, but asks us to have regard to the fact that subsequently there was laid

(1) [1929] 1 K. B. 619.

before a Mr. Chapman—the officer appointed by the Minister of Health to hold an inquiry—the five plans showing the lay-out to which I have already referred, that is on May 1, 1928; and that after May 7 they were in the possession of the Minister of Health. In my view, these facts cannot be taken into account by this Court in considering the preliminary question in this case: Did the scheme of the Liverpool Corporation comply with s. 38 of the Housing Act, 1925?

Mr. Yaffe, who is a property owner in the Queen Anne Street area, whose land would be affected by the scheme, on whose motion the writ was sought, sets out in his affidavit for the rule nisi a number of grounds on which he alleges that the alleged improvement scheme of the Council of March 7, 1928, is no scheme, or, alternatively, a defective scheme, within the meaning of the Housing Act, 1925. It is not necessary, in my opinion, again to state the considerations which moved the Court in *Rex* v. *Minister of Health. Ex parte Davis* (1) to hold that the Derby scheme there discussed was not valid. In my judgment the considerations set out here by Mr. Yaffe, which are not seriously contested, must have a similar result. Apart from the absence of plans showing the lay-out, he mentions one matter alone sufficient to invalidate the scheme. By para. 5 of the scheme it is provided, among other matters, that: "Any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased or otherwise disposed of, as the Corporation may think fit." And, in the particulars, by clause 4 it is further provided that: "After obtaining possession of the land the Corporation proposes to remove the buildings standing thereon, and afterwards to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable, or to dispose of the site by a sale in fee simple or by building leases, as they may deem to be most advantageous."

It was held by the Court of Appeal in *Rex* v. *Minister of Health. Ex parte Davis* (1) that a scheme must not confer on a local authority an unrestricted power to sell or lease the cleared area—the very power which is sought to be taken by this scheme.

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(1) [1929] 1 K. B. 619.

On November 23, 1928, the Minister of Health purported to confirm the alleged improvement scheme by Order under the official seal of the Minister of Health of that date. The Order, in the first place, recites by way of preamble as follows: "Whereas the Council of the City of Liverpool (herein referred to as 'the Council') caused a scheme dated March 7, 1928 (hereinafter referred to as 'the scheme'), to be prepared under Part II. of the Housing Act, 1925 (hereinafter referred to as the 'Act of 1925'), for the improvement of the area therein described, and did petition the Minister of Health (hereinafter referred to as 'the Minister') for an Order confirming the scheme. And whereas the Minister, after being furnished with evidence that the Council had complied with the requirements of the Act of 1925, caused a local inquiry to be held, and having received the report made upon such inquiry has decided to confirm the scheme subject to certain modifications therein"; and continues: "Now therefore the Minister, in the exercise of his powers under the Act of 1925, hereby makes the following Order: (1.) The Minister confirms the scheme as modified and set out in the schedule hereto." The principal modification is as follows: "All lands upon which dwellings are erected in pursuance of the last preceding clause shall, for a period of twenty-five years from the date of the Order of the Minister sanctioning this scheme, be appropriated for the purpose of dwellings for persons of the working classes, except so far as the Minister may dispense with such appropriation, and every conveyance, demise or lease of any of those lands shall be endorsed with notice of this provision." This appears to give the Minister some dispensing power for which it is difficult to find authority under a power to confirm a scheme.

Sect. 40 of the Housing Act, 1925, provides machinery for the confirmation of improvement schemes. After reciting that the local authority shall present a petition to the Minister praying that an Order may be made confirming the scheme, it provides by sub-s. 3 that : " The Minister after considering the petition may cause a local inquiry to be held, and, if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses, may by Order confirm the scheme with or without such conditions or modifications, so however that no addition shall be made to the lands proposed in the scheme to be taken compulsorily." On May 1, 2 and 3, 1928, the inquiry was held, despite a protest by counsel; no lay-out plans were produced there.

It will be observed that the Minister may by Order confirm the scheme with or without conditions or modifications. And it continues, by sub-s. 5 : " The Order of the Minister when made shall have effect as if enacted in this Act." I doubt whether the statutory power of the Minister to make modifications covers the amendment in para. 7 of this schedule of modifications of March 7, 1928, and whether the provision " that all lands . . . . be appropriated for the purpose of dwellings for persons of the working classes except so far as the Minister may dispense with such appropriation " is properly within his powers, if such a provision would have originally been bad, but in the view I take of this case it is not necessary to decide this point. The absence of plans required by the Act to be sent to the Minister may produce another difficulty.

This recital of facts concludes the history of the case so far as it is material, and upon them it is argued against the Minister that the original scheme was no scheme within the meaning of the Act, and, therefore, that the Minister had no power to confirm, either with or without modifications, that which in itself was not within the powers of the local authority under the Act. The Minister, on the other hand, primarily bases his case on s. 40, sub-s. 5, which I have already quoted, to the following effect : " The Order of the Minister when made shall have effect as if enacted in this Act," and the learned Attorney-General argues that the Order when made is to be regarded as a part of an Act of Parliament, which the Courts cannot question. To the objection that the Order is a confirming Order and that in fact it here confirms nothing and, therefore, that he has not made an Order within the meaning of sub-s. 5, he replies that the Order signed by the Minister on the face of it recites that it does confirm an improvement scheme of the local authority; that on the face of it, it is not possible to point to any lack of jurisdiction or irregularity, and that any defect relied upon can only be obtained by travelling outside the Order itself, which the Court is not able to do.

I think this argument cannot be maintained. In *Reg.* v. *Local Government Board* (1) the Local Government Board purported to make an Order said to be made under s. 32 of the Poor Law Amendment Act, 1834. The Order provided for matters held to be beyond their jurisdiction under s. 32, and was quashed on certiorari. Apart from this authority I do not think that the Court is precluded from considering the nature of the scheme which the Minister purports to confirm, both for general reasons and reasons peculiar to this case. Para. 1 of his Order states that the Minister confirms the scheme as modified and set out in the schedule. For the purpose of considering the meaning of the scheme (as modified) the fact that the Order itself states that the scheme is a modification, brings in the original scheme in the sense that the effect of the modification cannot be appreciated unless the scheme itself be referred to. The same result may be arrived at in another and more general way. The Order of the Minister referred to in s. 40, sub-s. 5, is, by sub-s. 3 of the same section, an Order confirming the scheme, and a scheme thus confirmed, either with or without modifications, is the scheme of the local authority. Unless sub-s. 5 by its language prohibits it, I think that the Court would have power to consider whether the confirming Order was in fact an Order within the meaning of s. 40 or not—a question which would

(1) [1901] 1 Q. B. 210.

depend, at any rate in part, upon the determination whether there was or was not a scheme before the Minister which he could confirm.

But it is said that the words of s. 40, sub-s. 5, that "the Order of the Minister when made shall have effect as if enacted in this Act," must be given a meaning. I respectfully agree. The power of the Minister to make modifications in the scheme (which modifications as I have indicated are confined I think to modifications in a scheme legally intra vires but administratively imperfect) would perhaps require further local inquiry to be held were it not for these enabling words. There is, however, I think, a confusion of thought in saying that because an Order made by the Minister shall have a certain effect, that, therefore, what purports to be an Order shall necessarily be deemed to be an Order, and the real question in this case (which distinguishes it from the cases on ultra vires Orders governed by the line of authority of which *Institute of Patent Agents* v. *Lockwood* (1) is the leading example) is that in that case—to which I shall later refer—the issue was whether the rules there made by the Board of Trade were rules which the Board of Trade were entitled to make, whereas here, the argument for the appellant is that the Order (or as it would have been in *Lockwood's* case (1) the rules) was not an Order or rule at all. I do not think that the mere fact that the minister describes the Order as an Order necessarily constitutes it one. If we were to assume that the Order of the Minister did not purport to confirm anything, I think it is clear that it would be bad, for the Order contemplated by s. 40 is a confirming Order, whereas, if in fact there were no Order at all he could not confirm it, because there would be no scheme to be confirmed.

I have no doubt that as a matter of general principle, if there are no specific provisions to the contrary, the validity of the Order, although made and promulgated in accordance with the statutory authority, may be inquired into on the ground that the rule making power has not been exercised

(1) [1894] A. C. 347.

in accordance with the provisions of the statute by which it is created with respect to the form or the substance. Thus, in respect of regulations made under the Defence of the Realm (Consolidation) Act, 1914, s. 1, whereby His Majesty in Council was given power to issue regulations for securing the public safety and the defence of the realm, Lord Atkinson in *Rex* v. *Halliday* (1) said: "It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void." See *Chester* v. *Bateson* (2) (where the regulation purporting on the face of it to be properly so made under the same Act was held to be ultra vires and void); *Lipton, Ld.* v. *Ford* (3); *Newcastle Breweries* v. *The King* (4); *Robinson (John) & Co.* v. *The King* (5); see also *Duncan* v. *Crighton* (6), where the Court of Session decided that an Order of the Lords of Council on Education regulating elections to school boards was ultra vires and void though good on the face of it.

There is abundant authority, much of it of great antiquity, that a by-law, good on the face of it, may be treated by the Courts as unenforceable. A by-law is not valid if not in pursuance of the authority; per Pollock C.B. in *Brown* v. *Holyhead Local Board*. (7) Moreover, the approval of a by-law by the authority mentioned in the statute under which it is made does not give it validity if it is in other respects not in accordance with the statutory power: *Ipswich Tailors'* case (8); *Stationers' Co.* v. *Salisbury* (9); *Reg.* v. *Wood* (10); *Kennaird* v. *Cory & Son*. (11)

In *Spreadborough* v. *Walcott* (12) the Court asserted its power to inquire into the validity of by-laws made without statutory authority although they had been confirmed by

(1) [1917] A. C. 260, 272.
(2) [1920] 1 K. B. 829.
(3) [1917] 2 K. B. 647.
(4) [1920] 1 K. B. 854.
(5) [1921] 3 K. B. 183.
(6) (1892) 19 R. 594.
(7) (1862) 32 L. J. (Ex.) 25.
(8) (1615) 11 Rep. 53A.
(9) (1693) Comb. 221.
(10) (1855) 5 E. & B. 49.
(11) [1898] 2 Q. B. 578.
(12) (1904) St. R. Queensland, 104.

the proper authority under the statute; see also *Rossi* v. *Edinburgh Corporation.* (1)

In *Toronto Municipal Corporation* v. *Virgo* (2) it was held, in the Privy Council, that an Act which gave to a municipal council power to make by-laws for regulating and governing a trade, could not authorize a by-law making it unlawful to carry on a lawful trade in a lawful way. There is further abundant authority for the proposition that by-laws, regulations or orders cannot escape judicial criticism merely by reason of the fact that they are stated on the face of them to be made in pursuance of the power of a statute or of a Minister. Similarly, orders which it is alleged do not follow the procedure necessary to their making may be challenged: *Metcalfe* v. *Cox* (3); *Jones* v. *Robson.* (4)

These observations, however, may need modification by reason of the fact that in this particular section of the Housing Act, which gives the Minister power to confirm an improvement scheme, it is provided that an Order of the Minister when made shall have effect as if enacted in the Act. It is to be remarked that there is absent from this section such a provision as occurs in the Extradition Act, 1870, s. 5, to the effect that the validity of an Order in Council made under that Act "shall not be questioned in any legal proceedings whatever" — a provision which — arguably — might have the effect of excluding the inquiry which we are here asked to undertake. In Sch. III., cl. 2, of this Act in connection with provisions for the compulsory acquisition of land, occur these words: "The confirmation by the Minister shall be conclusive evidence that the requirements of the Act have been complied with, and that the Order has been duly made and is within the powers of this Act." The contrast to the words in s. 40, sub-s. 5, is significant. It is clear from the decision in *Institute of Patent Agents* v. *Lockwood* (5) that subordinate legislation by way of rule or order is to be read with the original Act as if they were one

(1) [1905] A. C. 21.
(2) [1896] A. C. 88.
(3) [1895] A. C. 328.
(4) [1901] 1 Q. B. 673.
(5) [1894] A. C. 347.

Act, but this leaves open the question whether in this case there is any subordinate legislation at all. In *Reg.* v. *Pharmaceutical Society of Ireland* (1) Palles C.B. says (2), speaking of the effect of *Lockwood's* case (3), that there being a provision under the Patents, Designs and Trade Marks Act, 1888, under consideration in *Lockwood's* case (3) that rules made thereunder " shall be of the same effect as if they were contained in this Act," they might, nevertheless, be rules ultra vires. " One instance of such a rule is referred to by the Lord Chancellor—viz., a rule which would be in contradiction to the express provision of the Act." O'Brien J. in the same case says (4): " The present case . . . . goes far beyond *Lockwood's* case. (3) No doubt, wherever statutory efficacy is given by Parliament to rules made pursuant to a statute, the House of Lords and all subordinate tribunals, wherever similar words occur, must follow that decision. But, though the House of Lords' decision is conclusive in all such cases, it does not, in my opinion, govern the present, for the distinct reason, glanced at by the Lord Chief Baron, but not, I think, made part of the ground of his decision, that this is really not a case of applying the principles of ultra vires or intra vires at all—principles conversant with rules made in execution of the objects of an Act of Parliament, or in professed pursuance of an Act. This rule in question can hardly even be suggested to be a rule made in professed pursuance of the Act; or of the objects contemplated by the Legislature. It is nothing of the kind; it was made for a wholly different purpose, with an object, and in regard to a subject matter, in my opinion, wholly and completely unauthorized."

In distinguishing the present case from *Lockwood's* case (3) I apply the view there expressed by O'Brien J. to the present case, and would say: " This is really not a case of applying the principle of ultra vires or intra vires at all—principles conversant with rules made in execution of the objects of an Act of Parliament or in professed pursuance of an Act.

(1) [1899] 2 I. R. 132.
(2) Ibid. 141.
(3) [1894] A. C. 347.
(4) [1899] 2 I. R. 154.

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It is in regard to a subject matter wholly and completely unauthorized." In the *Pharmaceutical Society* case (1) rules were made which were held by the Court to be repugnant to the provisions of the Pharmacy (Ireland) Act, 1875, but here the alleged Order is not only repugnant but is even further from an Order made in pursuance of the Act which is an Order to confirm a scheme, in that in the present case there is, it is contended, no scheme to be confirmed at all. In *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners* (2) a question arose as to the validity of regulations made under the National Insurance Act, 1911, which provided that the regulations so made shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act, with a proviso as to their annulment upon prayer. The Court held that it had no jurisdiction to review the regulations, but the Lord President says (3): "The regulations taken as a whole constitute, in effect, an amending Act of Parliament. They have exactly the same effect as if they had been passed by Parliament. Obviously that would not be so if the regulations related to any other topic than the health insurance part of the National Insurance Act. If, for example, the regulations related to the unemployment part of the Act, then they would not have statutory force and we should have power at once to set them aside." These words appear to me to be apt to the present case with this difference, that in the judgment of the Lord President, he is assuming some possible order or regulation made under another Act or part of an Act, whereas, in the present case, for want of a scheme to be confirmed, the alleged confirming Order can properly repose upon no Act at all. In other words, having come to the conclusion that this alleged Order is an Order confirming nothing, or, to put it in another way, is no Order, I approach the problem from that angle and ask whether the Court is precluded, because the Minister has stated that an Order confirms a scheme, whereas in fact it

(1) [1899] 2 I. R. 132.

(2) 1915 S. C. 504.

(3) 1915 S. C. 510.

confirms nothing, from granting certiorari to quash the supposititious Order. On this view, I do not think that the case of *Institute of Patent Agents* v. *Lockwood* (1) is really material. In that case Lord Herschell L.C. says (2): "But there is no doubt another very important question which has been argued before your Lordships, namely, whether this question"—that is whether the rules were or were not intra vires—"can be canvassed in the courts, when once the rules have been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament." After reciting the language of the Patents, Designs and Trade Marks Act, 1888, s. 101, which, subject to a provision that the rules there made are to be laid before both Houses of Parliament, is not materially different from the provisions in this case, he continues: "They are to be 'of the same effect as if they were contained in this Act.' My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts." But he continues: "I own I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which is the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. These are points which I need not dwell upon on the present occasion."

(1) [1894] A. C. 347. (2) [1894] A. C. 359.

I think it is clear throughout the judgment of the Lord Chancellor and, indeed, throughout those of the other learned Lords who concur with him on this point, that they speak on the assumption that a rule, whether intra or ultra vires, had in fact been made in that case, nor was it disputed to the contrary, and this fact alone so distinguishes that case from the present one where, in my view, no Order has been made at all, that I cannot think that *Lockwood's* case (1) is any authority or assistance in the determination of the present case. Thus again, Lord Watson (2) speaks of the Board of Trade not having exceeded their discretion—a discretion which they undoubtedly had under that Act; but the present case is not one of discretion at all but of interpretation of nugatory ministerial proceedings.

Further illustration of the difficulties in the way of upholding the validity of this Order is supplied by the following cases. In *Irving* v. *Askew* (3) Hannen J. said (4): "If the rule were really repugnant to the provisions of the Act of Parliament, I should think that the rule, though made under the powers of the Act, would not over-ride its enactments." A similar view is expressed by James L.J. in *Ex parte Davis* (5), where he says (6) with reference to the Bankruptcy Rules, 1870, "the Act of Parliament is plain, and the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled the rule must give way to the plain terms of the Act": see also *In re Solicitor* (7), per Lord Coleridge C.J.; *Hacking* v. *Lee* (8); *King* v. *Henderson*. (9)

According to Lord Blackburn in *Garnett* v. *Bradley* (10): "The [Judicature] Act of 1875 provided, in the 16th section, that the orders contained in the schedule should be considered part of the Act, subject to all provisions to be made hereafter; and it did make them part of the Act, and the orders contained in that schedule are as much part of the Act, and of the will of the Legislature in the passing of the Act, as any section

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(1) [1894] A. C. 347.
(2) [1894] A. C. 364.
(3) (1870) L. R. 5 Q. B. 208.
(4) Ibid. 211.
(5) (1872) L. R. 7 Ch. 526.
(6) L. R. 7 Ch. 529.
(7) (1890) 25 Q. B. D. 17, 23.
(8) (1860) 29 L. J. (Q. B.) 204, 206.
(9) [1898] A. C. 720.
(10) (1878) 3 App. Cas. 944, 964.

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in the Act itself." Nevertheless in *Hartmont* v. *Foster* (1) Lindley L.J. says (2): "If there were any inconsistency between s. 49 of the Judicature Act, 1873, and Order I., r. 2, the rule must give way to the statute": see also *Richards* v. *Attorney-General of Jamaica.* (3) These authorities support the view that the principle that rules must be construed in accordance with the spirit of the Act under which they were made, applies equally in cases like the present one, where it is enacted that the Order shall have effect as if enacted in the Act. If then, notwithstanding such a provision as is contained in s. 40, sub-s. 5, of the Housing Act, 1925, it is possible that a rule or Order, if inconsistent with the Act, may be pro tanto ultra vires, and if the purpose of the Act may be considered in the interpretation of the Order, the position in this case is stronger against the validity of the Order than in the cases I have cited, for here the purpose of the Order is to confirm a scheme, and if, as I find, there is here no scheme to be confirmed, it must follow that such an Order is inconsistent with the Act and cannot possibly be made in pursuance of it.

In *Rex* v. *Minister of Health. Ex parte Davis* (4), on facts materially similar to those in the present case, where also no scheme had been prepared by the local authority which was capable of confirmation, prohibition was granted against the Minister and, in the King's Bench Division, Avory J. appears to have indicated obiter that the scheme "as it stands might possibly be sanctioned by the Minister, and that if once sanctioned by him there is no remedy by which the validity of it could be tested"—an observation which appears to have influenced Talbot J. in the Court below. This is a view I find myself unable to accept. I am impressed by the opinion of Atkin L.J. in this Court in *Rex* v. *Electricity Commissioners* (5), which was also a case for prohibition under the Electricity (Supply) Act, 1919 (by which it was provided that the Order after confirmation

(1) (1881) 8 Q. B. D. 82.
(2) Ibid. 85.
(3) (1848) 6 Moore P. C. 381.
(4) [1929] 1 K. B. 619.
(5) [1924] 1 K. B. 171, 206.

was to be laid before each House of Parliament and was not to come into operation until approved, with or without amendment by each House, and when so approved, was to have effect as if enacted in the Act of 1919), to the effect that "I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction." I find it difficult to understand how, if the Minister may be restrained from confirming the Order on the ground that he has no power so to confirm, it can be said that certiorari will not lie where a confirmation, admittedly invalid, has been made. Such a proposition can only be supported by saying that the confirmation has made the Order unchallengeably a part of an Act of Parliament and, for the reasons I have indicated, I cannot think that when a confirmation is a nullity it can be protected in this way.

The learned Attorney-General relied upon the genealogy of the Housing Act, 1925, to show that the Minister had inherited a power to make an Order which could not be questioned by reason of the fact that the Act is described in its title to be a consolidation Act, and that its predecessors conferred such a power. By s. 8 of the Housing of the Working Classes Act, 1890, power was given to the Local Government Board to confirm an improvement scheme of the local authority in the form of a provisional order. Such a provisional order, if petitioned against, would require the consent of Parliament in a Provisional Order Confirmation Act to give it legal authority. And, in such a case, the provisional order when so confirmed, would be part of the Provisional Order Confirmation Act and, consequently, could not be questioned in a Court of law; but its validity would not depend upon the Housing of the Working Classes Act, but upon the Provisional Order Confirmation Act: see May's Parliamentary Practice, 13th ed., chapter 31. By the Housing of the Working Classes Act, 1903, s. 5, sub-s. 2, it was provided that (subject to certain conditions which were subsequently deleted by s. 24 of the Housing, Town Planning, &c., Act, 1909) the Order of the confirmation authority under s. 8, sub-s. 4, of the principal Act shall, notwithstanding anything in that section, take effect without confirmation by Parliament. And it is this provision of the Act of 1903, as amended by the Act of 1909, which is said to be consolidated by the Act of 1925, which we have here to consider. The historical consideration appears to me to avail the Minister nothing, for in my view, after 1903, the validity of an Order of the Local Government Board (the predecessor of the Ministry of Health), ceased to depend upon the Provisional Orders Confirmation Act and depended upon the Housing of the Working Classes Act itself, and therefore the consolidation Act of 1925 has not altered the position as it has existed since 1903—namely, that the authority of the Order enures from the Housing of the Working Classes Act, now from the Housing Act, 1925, and not from any other statute, so that there is, from this point of view, no different effect to be given to the consolidation Act of 1925 than there was to the Acts of 1903 and 1909.

The history of the legislation does, however, reveal this fact, that the Housing of the Working Classes Act, 1903, as amended by the Act of 1909, and continued in the Act of 1925, does away with all Parliamentary control subsequent to the making of the Order, and that after their promulgation the Orders of the Minister are completely unchallengeable unless it be by process in a Court of law. The general principle that certiorari lies to remove proceedings of any jurisdiction newly erected by Act of Parliament is well established: see *Rex* v. *The Inhabitants in Glamorganshire* (1) and *Rex* v. *Woodhouse* (2), in which Fletcher Moulton L.J. says (3): "The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court brings

(1) 1 Ld. Ray. 580.
(2) [1906] 2 K. B. 501.
(3) [1906] 2 K.B. 534.

up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts,' but the cases by which this limitation is supposed to be established show that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial.' . . . . The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law." And in *Rex* v. *Electricity Commissioners* (1) Atkin L.J. says (2): "The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised

(1) [1924] 1 K. B. 171.

(2) [1924] 1 K. B. 204.

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in these writs." The observations by Atkin L.J. in the same case concerning *Reg.* v. *Hastings Local Board* (1) are significant for that was a case where a provisional order of the Secretary of State was not to be valid until confirmed by Parliament, and, at the time of the application, no confirming Act of Parliament had been obtained, and the Court took the view that it would be to usurp the functions which did not belong to them if they stepped in between the provisional order and the exercise of the Parliamentary will: see per Cockburn C.J. (2) "It seems quite clear," says Atkin L.J. (3), "that there was [in the *Hastings Local Board* case (1)] no order in existence in respect of which certiorari could be granted." And he concludes that he has considerable doubt whether there was there any such definite order as could be made the subject of certiorari. Now, in the *Electricity Commissioners*' case (4), the Commissioners had in fact not fully considered the scheme, which could not come into operation until confirmed by the Minister of Transport and approved by Parliament. But I read Atkin L.J.'s observations as indicating that had the Minister of Transport so confirmed, it might well be that his provisional order, notwithstanding the *Hastings Local Board* case (1), on the authority of *Church* v. *Inclosure Commissioners* (5) could have been the subject of certiorari.

One further consideration affords a reason why the Court may properly consider the validity of this Order. It is provided by the Documentary Evidence Act, 1868, s. 2, as amended by the Documentary Evidence Act, 1882, s. 4, that prima facie evidence of an order issued by a competent department, may be provided by the production of a certified copy of such an Order. This indicates that the matter of the making of the Order is a matter which is prima facie proved by its production, but, unlike Acts of Parliament (other than certain Private Acts), which need no proof (see the Interpretation Act, 1889, and *Rex* v. *Sutton* (6)), in the case of an

(1) 6 B. & S. 401.
(2) Ibid. 406.
(3) [1924] 1 K. B. 209.
(4) [1924] 1 K. B. 171.
(5) (1862) 11 C. B. (N. S.) 664.
(6) (1816) 4 M. & S. 532.

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Order not required by statute to be judicially noticed (as in the present case), evidence of its making is only prima facie and it remains a question of fact whether it has or has not been made.

For these reasons, I have come to the conclusion, adapting the apt language of Sir John Comyns, that the alleged Order is "legi, fidei, rationi non consona" (Digest tit. By-law B1), that the Divisional Court was wrong in refusing to issue a writ of certiorari to remove into Court the Order of the Minister of Health of November 23, 1928, that it may be quashed, and that this appeal should be allowed.

*Appeal allowed.*

Solicitor for Minister of Health: *Solicitor to the Ministry of Health.*

Solicitor for Liverpool Corporation: *Town Clerk, Liverpool.*

Solicitors for applicant: *Few & Co., for W. J. Shield, Liverpool.*

J. S. H.

## MOURTON *v.* POULTER.

1930
*Feb.* 26, 27.

*Negligence—Contractor felling Tree—Duty to Trespasser—Child playing on Land—Injury by falling Tree—Absence of Warning.*

A piece of waste land, whose owner was laying it out as a building estate, adjoined the highway and was unfenced, and the children of the neighbourhood, without any licence to do so, used it as a playground. On the land there was a large elm tree, and by a contract between the owner and the defendant, who was a nurseryman, the latter undertook to fell the tree. On the day on which the tree was expected to fall there were many children on the land, and the defendant or his assistant more than once drove them back from the tree. At 5.15 P.M. the tree was held up by one root only, and the defendant, knowing that when that root was cut the tree would fall within two minutes and without giving any further warning to the children, cut that last root, whereupon the tree fell and in its fall hurt the plaintiff, a boy ten years of age. In an action in the county court by the plaintiff against the defendant for personal injuries the judge found that the defendant had been guilty of negligence in not warning the children that the tree was about to fall, and that the plaintiff's injuries were due to that negligence; but he further found that the plaintiff was a trespasser on the land, and on that ground he gave judgment for the defendant. On appeal:—

*Held*, that the defendant owed a duty even to a trespasser not to do any act, which would alter the condition of the land and might injure him, without giving him warning; that the judge in finding that the defendant had been negligent had found that he had committed a breach of that duty towards the plaintiff, though a trespasser; and that the plaintiff was entitled to judgment.

*Excelsior Wire Rope Co.* v. *Callan and Others* [1930] W. N. 55 (since reported [1930] A. C. 404) followed.

*Addie (Robert) & Sons (Collieries), Ld.* v. *Dumbreck* [1929] A. C. 358 considered.

APPEAL from Brentford County Court.

Mr. F. W. Ferris was the proprietor of a piece of land at East Acton, which he was proceeding to lay out as a building estate. The land was adjacent to the high road, and in view of the intended building operations it was left for the time being in a derelict condition and not completely fenced. In these circumstances the children of the neighbourhood made use of the land as a playground. On the land there was an elm tree about 50 or 60 feet high, which had to be removed before the intended building work could be carried out. Mr. Ferris accordingly consulted the defendant, Mr. A. Poulter, a nurseryman of long experience, and a contract was entered into between them by which the latter undertook to fell the tree. The work of felling the tree began on Friday, August 2, 1929. Early on Tuesday, August 6, it was expected that the tree would soon fall, and in anticipation of its fall a large number of children came on to the land and approached the tree. About mid-day the defendant drove the children back from the tree, but they returned to it, and between three and four o'clock in the afternoon his assistant again drove them back, but they again returned. About five o'clock, the tree was being held up by one root only, and it was known to the defendant that when that root was cut the tree would fall within about two minutes. At 5.15 the defendant or his assistant, knowing that the tree would fall in about two minutes thereafter, and without giving any further warning to the children who were standing around, cut that last root and within that time the tree fell. Three boys were caught by the fall of the tree and two of them were not injured, but the third, the present plaintiff, Herbert Mourton, a boy ten years of age, was crushed and injured.

The plaintiff by his father as next friend brought the present action against the defendant in the county court for damages for personal injuries, alleging that the defendant had been guilty of negligence in causing the tree to fall upon the plaintiff, in failing to give the plaintiff any warning that the tree was about to fall, and in not moving the plaintiff to a place of safety.

The defendant in his defence said that he was not negligent in any of the respects alleged, that his negligence, if any, was not the cause of the plaintiff's injuries, that the plaintiff's injuries were caused or contributed to by his own negligence, and that the plaintiff was a trespasser on the land in question.

The county court judge, having heard the evidence on both sides, and assessed the damages sustained by the defendant at 25*l.*, gave judgment as follows: "I hold that the plaintiff has not proved that the owner of the land had either invited him or licensed him to be on the land. I hold that the defendant was negligent in not warning the children that the tree was then about to fall, and that the injury suffered by the plaintiff is due to such negligent omission. I give judgment for the defendant in law with costs."

The plaintiff appealed on the grounds: first, that the county court judge was wrong in law in entering judgment for the defendant; and, secondly, that there was no evidence upon which the judge could find that the infant plaintiff was a trespasser.

*F. G. Paterson* (*C. T. Williams* with him) for the plaintiff, appellant. The judgment of the learned county court judge in favour of the defendant was wrong and should be set aside and judgment entered for the plaintiff.

The judge found as a fact that the defendant was guilty of negligence towards the plaintiff in not warning him of the impending fall of the tree. On that finding he should have entered judgment for the plaintiff. His further finding that the plaintiff was neither an invitee nor a licensee, or in other words that he was a trespasser, did not entitle him to enter judgment for the defendant. It does not appear that the plaintiff was a trespasser. The onus was upon the defendant of proving that the plaintiff was a trespasser, and he did not discharge it. There was no evidence to support the finding that the plaintiff was a trespasser. If the plaintiff was a trespasser upon the land he could be treated as such only by the owner or the occupier of the land, and as the defendant was neither the owner nor the occupier of the land but only a contractor who happened to be there in the course of carrying out his contract, he had no such possession of the land as entitles him to set up the defence that the plaintiff was a trespasser. The case of *Addie* (*Robert*) *& Sons* (*Collieries*), *Ld.* v. *Dumbreck* (1) is distinguishable from the present case, for there the defendants were the owners or occupiers of the land upon which the child who was killed had trespassed. Even if the defendant

(1) [1929] A. C. 358.

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be equally entitled with the owner or occupier to treat the plaintiff as a trespasser he owed a duty to the plaintiff, as soon as he knew of his presence upon the land, to warn him of the impending fall of the tree. An owner or occupier of land is under a duty to a trespasser not to do intentionally or recklessly an act which injures him: *Latham* v. *Johnson (R.) & Nephew, Ld.* (1), per Hamilton L.J.; *Barnes* v. *Ward* (2); and *Degg* v. *Midland Ry. Co.* (3) An occupier of land is liable even to a trespasser for positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence: Salmond on Torts, ch. xii., sect. 123, 7th ed., p. 469, citing *Petrie* v. *Owners of SS. Rostrevor.* (4) In *Excelsior Wire Rope Co.* v. *Callan and Others* (5) the defendants were only licensees of the land on which the injured child had trespassed, yet they were held liable for the injuries caused to the child by their act. In the present case the defendant actually saw the plaintiff standing close to the tree two minutes before he knew that it would fall, and in these circumstances it was clearly his duty to warn the plaintiff. *Addie's* case (6) is further distinguishable on the ground that the dangerous thing there in question—namely, a wheel round which a cable passed—was not visible to those who set it in motion, and they did not in fact know that the child who was killed was close to the wheel.

*James MacMillan* for the defendant, respondent. The judgment of the county court judge was right. The judge found as a fact that the plaintiff was a trespasser upon the land. The owner or occupier of land owes no duty to a trespasser on the land to protect him from injury resulting from ordinary negligence, the only kind of negligence for which he is liable to the trespasser being reckless negligence: see *Addie (Robert) & Sons (Collieries), Ld.* v. *Dumbreck.* (6) Though the defendant was only upon the land as an invitee or licensee for the purpose of carrying out his contract with the owner, yet he was in the same position as the owner or occupier in not being liable to a trespasser for ordinary negligence but only for reckless negligence. The finding of the county court judge that the defendant was negligent in not warning the plaintiff that the tree was about to fall was only a finding of ordinary negligence and not of such reckless negligence as is necessary to render the occupier liable to a trespasser. There was no evidence to support a finding of reckless negligence. The fact that the defendant did not warn the plaintiff immediately before the tree fell was no evidence of reckless negligence on his part. The fall of the tree was not a separate act altering the condition of the land and exposing the persons who happened to be upon it to an unforeseen danger: it was only a part of the operation of felling the tree which had continued for several days, and of which the plaintiff was well aware. There was no breach by the defendant of any duty which he owed to the plaintiff. This case is governed by *Addie's* case. (1) The case of *Excelsior Wire Rope Co.* v. *Callan and Others* (2) is distinguishable, for there the question of the duty owed by an occupier of land towards an invitee, licensee, or trespasser did not arise.

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(1) [1913] 1 K. B. 398, 411.
(2) (1850) 9 C. B. 392, 420.
(3) (1857) 1 H. & N. 773, 780.
(4) [1898] 2 Ir. R. 556.
(5) [1930] A. C. .
(6) [1929] A. C. 358.

SCRUTTON L.J. This is an appeal from a decision of the judge of the Brentford County Court, who held that a person who felled a tree was not liable for injuries caused to a child by the fall of the tree. This case is rendered a little difficult by its being necessary to endeavour to ascertain the grounds upon which two decisions of the House of Lords in somewhat similar cases have recently been given in contrary directions. [His Lordship stated the facts substantially as above set out, and after observing that the person engaged in felling the tree was more likely to know how far the branches would extend when the tree fell than the children who were standing round, continued as follows:] The county court judge's note of his judgment is a little puzzling. He says: "I hold that the defendant was negligent in not warning the children that the tree was then about to fall, and that the injury suffered by the plaintiff is due to such negligent omission." Negligence involves a duty, and the judge must therefore have found that there was a duty owing by the defendant to the children to warn them that the tree was going to fall, and he found that the injury which the plaintiff sustained was due to the failure of the defendant to fulfil that duty. In spite of these findings, however, he also said in the note: "I give judgment for the defendant in law with costs," and "I hold that the plaintiff has not proved that the owner of the land had either invited him or licensed him to be on the land." That last mentioned finding means presumably that the plaintiff was a trespasser, but in spite of that finding the judge has found that there was a duty owing by the defendant to a trespasser to warn him that the tree was about to fall and that the defendant's neglect of that duty was the cause of the injury suffered by the plaintiff. Counsel for the defendant has urged that the ground of the county court judge's judgment was that the only duty in respect of negligence that is owed by a person in occupation of land to a trespasser is a duty not to do him an injury by negligence so reckless as to be equivalent to a malicious act, and that what the judge found here was less than reckless negligence or malicious conduct and amounted at most to a negligent failure to use due care. There is no trace in the judge's note of any intention to limit his finding of negligence in that way. The judge, having found that there was a breach by the defendant of the duty which he owed to the children, would seem at that stage to have had his attention directed to the judgments of the House of Lords in *Addie* (*Robert*) *& Sons* (*Collieries*), *Ld.* v. *Dumbreck* (1), and to have thought that in view of that case there could not be such a duty as he had found if the plaintiff was a trespasser, and consequently that if the plaintiff was a trespasser the defendant would not be liable.

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(1) [1929] A. C. 358.

(2) [1930] A. C. 404.

Shortly before the appeal from the Scottish Court in *Addie's* case (1) came before the House of Lords, the Court of Appeal had a somewhat similar case of its own to decide—namely,

(1) [1929] A. C. 358.

*Excelsior Wire Rope Co.* v. *Callan and Others.* (1) In that case a strip of land belonging to the Marquis of Bute was next to a recreation ground let to the Cardiff Corporation. An intervening boundary fence had been broken down. On the strip of land there was an endless wire rope running round a wheel operated by licensees of the Marquis, who had no estate or interest of their own in the land and used the rope only two or three times a week for the haulage of trucks between their works and the neighbouring railway. Children played about all round this sheave on the strip of land while the rope was not running and swung on the rope. The licensees knew that this was so, and they employed two men to see before the haulage began that the rope was properly placed round the pulley, and that there were no children near it, and then to start the engine. On the occasion in question, after the men had seen that the rope was round the wheel and had driven the children away, one of them went about twenty yards from the sheave to give the signal, while the other went to start the engine. The man who was to give the signal could from his position see the sheave, but apparently he was not looking towards it immediately before the engine was started, and a young child got her hand caught between the wheel and the rope, and her brother who came to help her also had his fingers crushed. Shearman J., who tried the case, held that the children were licensees. The Court of Appeal, of which I was a member, assumed that they were trespassers, but took the view that persons who started the rope when they knew that there might be children in its neighbourhood, and who were themselves in a position from which if they had looked they could have seen the children beside it, were guilty of negligence.

The material facts in *Addie's* case (2) were very similar to those in *Excelsior Wire Rope Co.'s* case. (1) In *Addie's* case (2) the House of Lords held that as the children were trespassers the defendant company and its servants owed them no duty to protect them from injury. The Court of Appeal had less than a month before decided the *Excelsior Wire Rope Co.'s* case (1) the other way. Encouraged by the decision of the House of Lords in *Addie's* case (2) the unsuccessful defendants in the *Excelsior Wire Rope Co.'s* case (1) got a stay of execution and appealed to the House of Lords, but on the appeal coming before it the House of Lords affirmed the decision of the Court of Appeal. The only distinction between these two cases, so far as I can see, is that in *Addie's* case (2) the people who set the wire rope in motion were down a hill at a place from which they could not see the wheel and the children who were beside it, while in the *Excelsior Wire Rope Co.'s* case (1) the man who gave the signal to start the wheel was standing only about twenty yards away from it, and could have seen it and the children if he had looked round without moving from his position. Whether that is really the difference between the two cases the House of Lords may have to decide in some subsequent case. At any rate we must accept the decision of the House of Lords in *Excelsior Wire Rope Co.'s* case (1), which affirms a decision of the Court of Appeal. In both cases the person who started the machinery knew that children were likely to be about, so that apparently it cannot be said that the liability of the occupier to the trespasser depended on that fact.

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(1) [1930] A. C. 404.

(2) [1929] A. C. 358.

In the present case the defendant was a man experienced in felling trees, who knew the time when the tree would probably fall and the distance it would probably cover when it fell. He cut the last root by which the tree was supported, knowing that the tree would fall in about two minutes and that children were standing round, without giving any warning. It has been found by the county court judge that the defendant in so behaving was negligent, and that the injury suffered by the plaintiff was due to that negligence. The case may, I think, be compared to one in which, while blasting operations are going on and people are standing round, a man engaged in the work fires a blast without giving any previous warning. It seems to me that the man firing the blast would clearly be guilty of a breach of duty to these

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(1) [1930] A. C. 404. (2) [1929] A. C. 358.

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people even though they were trespassers, because he would have done an act which might do them an injury and would have done it without warning. In a case such as that the person who is about to do a dangerous act is under a duty to warn even trespassers. The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States of an innocent looking pond which contained poisonous matter: *United Zinc and Chemical Co.* v. *Britt.* (1) There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning.

That being in my view the true state of the law, it would seem to follow that the county court judge has come to a wrong conclusion. His finding that the defendant was negligent in not warning the children required him to give judgment for the plaintiff. I am therefore of opinion that the appeal should be allowed, and that judgment should be entered for the plaintiff for 25*l.* with costs.

LAWRENCE L.J. I agree. The county court judge has found as a fact that the defendant was negligent in not warning the children at the time when to his knowledge the tree was about to fall, and he has further found that the injury to the plaintiff was caused by that negligent omission. He has held, however, as a matter of law that the defendant was not liable because the plaintiff was a trespasser. In my opinion that decision was wrong. I share the difficulty experienced by my Lord of seeing how the judge could have found that the defendant was negligent without finding by implication that the defendant owed a duty

(1) [1922] 258 U. S. 268.

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to the plaintiff. Be that as it may, I think that this case is indistinguishable from the *Excelsior Wire Rope Co.'s* case (1), and that it is concluded by the decision in that case. I agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors for appellant: *Darracott, Seymour & Co.*
Solicitors for respondent: *Monson & Withers.*

J. R.

## *In re* WITHERS AND COMPANY.

C. A.

1930

*May* 13, 20.

*Appeal—Matter of Practice and Procedure—Application for Delivery of Bill of Costs—No Action pending—Whether Appeal lies to Court of Appeal or Divisional Court—R. S. C., Order* LIV., *r.* 23—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 3.

The respondents, a firm of solicitors, acted for the appellant in defending him in criminal proceedings before magistrates and at the assizes. The appellant was found guilty and sentenced to imprisonment. In respect of those proceedings the respondents delivered their bill of costs in summary form to the appellant's attorney, who paid it. A few years later the appellant took out an originating summons under the Solicitors Act, 1843, asking for delivery of a detailed bill of costs. The Master made an order for its delivery. The judge at chambers set aside the Master's order, but gave leave to appeal:—

*Held*, that the appeal did not relate to a matter of practice and procedure within s. 31, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925, and therefore that the appeal lay not to the Court of Appeal but to the Divisional Court.

APPEAL from an order of Talbot J. in chambers.

By an originating summons headed, "In the matter of" the various members of the firm of solicitors practising as Withers & Co., "and in the matter of the Solicitors Act, 1843, and in the matter of delivery of a bill of costs," the applicant, Mr. Hayley Morriss, asked that an order be made for delivery to him or to his solicitors, Messrs. Percy Bono & Griffith, of a bill of costs in all causes and matters from October 1, 1925, to March 31, 1926, wherein Messrs. Withers & Co. were acting professionally on his behalf.

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(1) [1930] A. C. 404.

Messrs. Withers & Co., who had acted for Mr. Hayley Morriss in various matters, including criminal proceedings in which he was defendant before magistrates and at assizes, resisted the application, as they said that they had delivered their bill of costs in summary form in 1925 and 1926 to the applicant's attorney, who had paid the same and waived his right to itemized bills.

The Master made an order that Messrs. Withers should deliver a bill of costs in respect of the criminal proceedings against the applicant before the magistrates and at the trial at assizes. Talbot J. reversed that order, but gave leave to appeal.

The applicant appealed.

*Roger S. Bacon* for the appellant.

*J. W. Morris* for the respondents. There is a preliminary objection to the hearing of this appeal, inasmuch as, not being a matter of practice and procedure, the appeal lies to the Divisional Court and not to the Court of Appeal: see Order LIV., r. 23, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 3. The test for deciding whether a matter is one of practice and procedure is whether it is one in, or in connection with, a cause or matter in the High Court: see per Buckley L.J. in *Yonge* v. *Toynbee* (1), where he adopted the language of A. L. Smith L.J. in *Watson* v. *Petts* (2); see also *In re Marchant* (3) and *In re Jackson.* (4) Here there was no action in the High Court with which the bill of costs had any connection. In *In re Wingfields* (5) the bill of costs there in question was in connection with an action in the King's Bench Division, and therefore an order for its taxation was held to be in a matter of practice and procedure. In respect of criminal proceedings at assizes no appeal lies at all except under the Criminal Appeal Act to the Court of Criminal Appeal. Certainly no appeal in respect of anything connected with those proceedings lies to this Court.

(1) [1910] 1 K. B. 215.
(2) [1899] 1 Q. B. 54.
(3) [1908] 1 K. B. 998.
(4) [1915] 1 K. B. 371.
(5) [1923] 2 K. B. 112.

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Withers & Co., In re.

*Roger S. Bacon* for the appellant. *In re Oddy* (1) decided that a summons for a review of taxation of a solicitor's bill of costs was a matter of practice and procedure, and nothing was said as to the nature of the original proceedings. In *Yonge* v. *Toynbee* (2), which is said to provide the test whether a matter is one of practice and procedure, Buckley L.J. said that " the expression ' practice and procedure ' is not confined to steps in the action itself, but covers also matters in connection with the action."

[Scrutton L.J. Criminal proceedings are not a " cause or matter."]

The matter may not have been in an action, but it was in connection with criminal proceedings at assizes which form a part of the High Court.

[He also referred to *Seaman* v. *Burley*. (3) ]

Scrutton L.J. This is a troublesome point, and one upon which the Court has more than once expressed the opinion that the statute governing it should be altered.

At one time all appeals from chambers went to the Divisional Court, but with the view of limiting the number of appeals the Judicature Act, 1894, provided that certain appeals should go not to the Divisional Court but to the Court of Appeal. It would have been easy, and would have been more satisfactory, if the statute had enacted that all appeals from a judge in chambers should go direct to the Court of Appeal, but that course was not pursued. What the statute said was that all appeals in matters of practice and procedure should go to the Court of Appeal, with the consequence that other appeals go to the Divisional Court. The result of this, with the various judicial attempts to settle what is practice and procedure, is partially exemplified by the number of books with which I am now surrounded containing decisions not easily reconcilable with each other. I do not propose to refer to these authorities; I propose to go back to the words of the statute in order to see whether this is an appeal in a matter of practice and procedure.

(1) [1895] 1 Q. B. 392.
(2) [1910] 1 K. B. 215.
(3) [1896] 2 Q. B. 344.

The facts are these: Mr. Hayley Morriss was defendant in certain criminal proceedings before magistrates and at a trial at assizes. He instructed Messrs. Withers & Co. to defend him. He was found guilty and sentenced to imprisonment. During these proceedings he appointed an attorney to act for him, and that attorney, taking such precautions as he thought proper, paid Messrs. Withers their bills, getting such detailed information with regard to them as he at the time thought right. Some years later Mr. Hayley Morriss asked for delivery of a detailed bill of costs as to these matters, and he proceeded by originating summons, heading it (inter alia), "In the Matter of the Solicitors Act, 1843." The Master in chambers ordered the solicitors to deliver a detailed bill of costs in respect of the proceedings before the magistrates and the proceedings at the trial at assizes. Talbot J. reversed that order, and declined to direct delivery of the bill of costs. From that refusal Mr. Hayley Morriss now appeals to this Court, whereupon counsel for Messrs. Withers takes the objection that the appeal should have been to the Divisional Court and not to the Court of Appeal. Counsel for Mr. Hayley Morriss contends that the appeal has been rightly brought to this Court; and the question is whether in those circumstances an originating summons asking for an order for delivery of a bill of costs under the Solicitors Act, 1843, or under the original jurisdiction of this Court, is a matter of practice and procedure. I have come to the conclusion that it is neither practice nor procedure, but is a question of substantive right under the Solicitors Act, the client having a right to delivery of a detailed bill of costs in certain cases and having no such right in others. That view fits in with some of the cases to which we have been referred. It cannot be said to be an order in the criminal proceedings; the order could not have been made in those proceedings; and even if it could have been made, no appeal would lie, either to this Court or to the Divisional Court. This is an independent matter arising out of the relation of solicitor and client under the Solicitors Act, and not under the criminal proceedings. For these reasons the preliminary objection must succeed.

I regret that this means referring the matter to the Divisional Court, but following the precedent we have acted upon in several cases we extend the time in order to allow an appeal to be brought to the Divisional Court in case it is out of time.

GREER L.J. I agree. The decisions and dicta of judges who have had to consider what are matters of practice and procedure as distinct from final decisions are very conflicting, and in those circumstances I feel that this Court is in a position to exercise its own judgment in the matter. I have come to the conclusion that in this case we ought to apply the distinction, well known to jurists, which exists between substantive decisions and adjective decisions. In the latter they would include decisions on practice and procedure. One would think that decisions as to matters of practice and procedure are those given in the course of legal proceedings to get a final result. In my judgment, a decision to be one in a matter of practice and procedure must be a decision in the course of an action or other matter in the High Court. Clearly the Commissioner of Assize who tried the criminal case in which Mr. Hayley Morriss was concerned could not have been asked to make an order in relation to these bills of costs as part of the criminal proceedings. The order is not one in relation to criminal proceedings, and there were no civil proceedings—either an action or other matter—pending in the High Court to which the order has relation. It may be that where a bill of costs is to be delivered in relation to a civil action in which judgment has been given, the action is still in existence for the purpose of dealing with any interlocutory matters not disposed of. But that is not this case. I agree that any appeal in this matter lies not to this Court but to the Divisional Court.

SLESSER L.J. I agree, and have nothing to add.

*Preliminary objection upheld.*

Solicitors for appellant: *Percy Bono & Griffith.*
Solicitors for respondents: *Withers & Co.*

J. S. H.

## HUDD *v.* MATTHEWS.

1930
*May* 13.

*Landlord and Tenant—Goodwill—Termination of Tenancy—Compensation—Trade or Business carried on by the Tenant for not less than Five Years—No Benefit to Landlord—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-ss.* 1 *and* 2; *s.* 5, *sub-s.* 1.

By the Landlord and Tenant Act, 1927, s. 4, sub-s. 1, the tenant of a holding to which Part I. of the Act applies is entitled at the termination of the tenancy or on quitting his holding to compensation from the landlord for goodwill if he proves that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for not less than five years goodwill has become attached to the premises "by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto":—

*Held*, that the basis of compensation under this Act is not the loss suffered by the tenant, but the benefit accruing to the landlord.

Under the above sub-section it is irrelevant to inquire whether the "higher rent" is derived from a letting for the purpose for which the premises were previously let or for any other purpose; and if the landlord could let the premises for any other purpose at a higher rent than they would have realized for the same purpose (goodwill included) he will not be liable to pay compensation to the tenant.

Appeal from Bloomsbury County Court.

The plaintiff was the tenant and the defendant the landlord of premises at 154 High Street, Camden Town, consisting of a house and shop, where he carried on the business of an eating-house. The plaintiff had purchased the goodwill of the business and lease of the premises from a previous tenant for 700*l.* in 1925, and in 1927 exercised the option to renew the lease for a further three years. The rent payable under the lease was 200*l.* per annum.

On June 14, 1929, the plaintiff gave notice to the defendant claiming to be entitled under the Landlord and Tenant Act, 1927, s. 4 (1), at the termination of his tenancy to compensation for goodwill or, in lieu of compensation, to a new lease of the premises under s. 5 of the Act. In August, 1929, the plaintiff brought this action in the Bloomsbury County Court under the Landlord and Tenant Act, 1927, for the grant of a new tenancy, or alternatively, for 2000*l.* compensation for loss of goodwill alleged to be attached to the premises by reason of the plaintiff and his predecessors in title having carried on the business of an eating-house there for twenty-five years, whereby the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto.

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(1) The Landlord and Tenant Act, 1927, s. 4, provides:—Sub-s. 1: "The tenant of a holding to which this part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason

The landlord's defence, so far as is here material, was that the premises would be used for a different and more profitable purpose than the business carried on by the plaintiff; and that, if any goodwill attached to the premises (which he denied) the premises could not be let at a higher rent by reason thereof. The action was sent to a referee, as provided by the Landlord and Tenant Act, 1927, s. 21, who reported that by reason of the plaintiff and his predecessors in title carrying on the business of an eating-house for twenty-five years at the premises goodwill had attached, but he was not satisfied that by reason thereof the premises could be let at a higher rent than they would have realized had no such goodwill attached. He therefore determined that the plaintiff was not entitled to any compensation for goodwill, and that as the plaintiff had failed to prove that he was entitled to

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whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto. Provided that (*a*) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title, and in determining such addition the tribunal shall, if it is proved that the premises will be demolished wholly or partially, or used for a different and more profitable purpose, have regard to the effect of such demolition or change of user on the value of the goodwill to the landlord."

Sub-s. 2: "For the purposes of this section, premises shall be deemed to be used for a more profitable purpose if, but not unless, the rent which the landlord could obtain for the premises if used for that purpose would be greater than the rent which could be obtained if they were used for the purpose of the trade or business carried on by the tenant."

compensation under s. 4, the grant of a new lease would not be reasonable.

Upon the plaintiff's application the county court judge made an order remitting the matter to the referee for further inquiry and report, being of opinion that in order to give effect to the Landlord and Tenant Act, 1927, s. 4, sub-s. 1, proviso (*a*), and to s. 4, sub-s. 2, it was necessary to read s. 4, sub-s. 1, as meaning that the tenant was entitled to compensation for goodwill if he proved to the satisfaction of the Court that by reason of the carrying on of the business of an eating-house by him or his predecessors in title for a period of not less than five years, goodwill became attached to the premises by reason whereof they could be let "as an eating-house" at a higher rent than they would have so realized "as an eating-house" had no such goodwill attached thereto. He remitted the matter to the referee to consider whether on this construction the tenant was entitled to compensation or a new lease.

The defendant appealed on the ground that this construction of s. 4, sub-s. 1, of the Act of 1927 was wrong in law.

*G. O. Slade* (*E. R. Guest* with him) for the defendant. The basis of compensation under the Landlord and Tenant Act, 1927, is the benefit which accrues to the landlord and not the loss sustained by the tenant. That this is so appears from s. 4, sub-s. 1, proviso (*a*), the object of which is to protect the landlord from the award of compensation against him in respect of matters from which he derives no benefit. (1) The concluding words are "the tribunal shall . . . . have regard to . . . . the value of the goodwill to the landlord." By inserting in his order to the referee the words "for the purpose of that trade or business" after the word "realised" in s. 4, sub-s. 1, the county court judge has reversed the basis of compensation. He has also inserted the same words after the word "let," but of these it is not now material to complain. The former insertion, however, not only alters the criterion for compensation provided by the statute, but renders the words "by reason whereof" concluding the sub-section mere

(1) See note (1) ante, p. 197.

surplusage. For goodwill which has "become attached to the premises" by reason of the carrying on of a particular business must of necessity connote an increased rental value for the purposes of that business.

The county court judge made the above insertions upon two grounds: (1.) that he found himself unable to reconcile s. 4, sub-s. 1, with proviso (*a*) thereto and sub-s. 2, and (2.) because he thought that some compensation might be payable to the tenant although the landlord derived no benefit from the goodwill. As to the first point, his reason was that if the tenant could prove that the most profitable letting was for his own trade or business, ex hypothesi it would not be possible for the landlord to prove that the premises would be let for a different and "more profitable purpose" as defined by sub-s. 2.

[TALBOT J. The words in sub-s. 1 are "could be," whereas those in the proviso are "will be."]

Yes; the tenant discharges the onus which lies upon him in the first place by proving hypothetically and in general that his is the most profitable purpose, whereupon the landlord can still avoid payment of compensation by proving a particular and perhaps fortuitous opportunity of letting for a "different and more profitable purpose." The landlord however must further satisfy the tribunal that the premises *will be* let for that purpose, proof being necessarily in futuro, as the tenant is compelled to commence proceedings for compensation in the case of a tenancy expiring by effluxion of time, "not . . . . less than 12 months before the termination of the tenancy": s. 4, sub-s. 1 (ii.).

As to the second point the learned judge was impressed by the use of the phrase "the tribunal shall . . . . have regard to" in proviso (*a*) in contradistinction to such a word as, e.g., "preclude." But the expression "have regard to" is merely employed to cover its three antecedents—namely, total and partial demolition and change of user. Moreover it is possible to suggest a number of circumstances in which the landlord might derive *some* benefit from the tenant's goodwill in spite of the proposed user for a different and more profitable purpose: e.g., where the more profitable user would not be commenced until some time after the termination of the tenancy.

There was accordingly no necessity to insert the words of which the defendant complains and the judge was wrong in inserting them. "It is the universal rule . . . . that in construing statutes . . . . the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity": per Lord Macnaghten (quoting Lord Wensleydale) in *Vacher & Sons, Ld.* v. *London Society of Compositors.* (1)

*Glyn-Jones* for the plaintiff. The object and intention of the Act of 1927 was to compensate the tenant for the loss which he has suffered by the termination of the lease and the destruction of the goodwill of the business. In s. 5, sub-s. 1, the word "goodwill" is used in its widest sense, but in s. 4, sub-s. 1, this is confined to the goodwill attaching to the premises. It must be of some value, and the value is arrived at for this purpose by comparing the rent of the premises including goodwill with the rent which would be fixed apart from goodwill. If the defendant is right the landlord need only take a higher rent for the premises for the purpose of another business, and the tenant's right to compensation for loss of goodwill of his business will be eliminated.

[FINLAY J. Does not your construction of s. 4, sub-s. 1, involve the insertion of the words "as an eating-house," which the county court judge adopted in his order?]

No, it is not necessary to add those words, because s. 4, sub-s. 1, is dealing with the goodwill of the particular business carried on by the tenant. Further, the defendant's construction cannot be reconciled with proviso (*a*), which gives relief to the tenant if it is proved that the premises are to be "used for a different and more profitable purpose," whereby the value of the goodwill to the landlord is affected. If the defendant's view is adopted, proviso (*a*) is otiose, because the value of the goodwill to the landlord is in all cases the only point to be considered.

(1) [1913] A. C. 107, 117.

Indeed if the defendant is right, all the provisos to s. 4, sub-s. 1, are meaningless and repugnant. The operative words of sub-s. 1 mean that where the tenant has left anything behind at the premises the Court must assess its value. If the landlord relets for the same purpose, the goodwill must be taken into account in assessing compensation ; if for a different purpose, a reduction is allowed on that account.

In conclusion, the basis of compensation in s. 4 is not the benefit accruing to the landlord but the loss suffered by the tenant through the termination of his holding.

*Slade* in reply. Sect. 4, sub-s. 1, imposes upon the tenant conditions precedent to any liability upon the landlord. Until each of these conditions is satisfied the proviso does not come into operation at all, and the landlord is not called upon to prove anything. The proviso is an additional protection to the landlord. It was not designed, neither does it operate, to diminish the onus which the tenant must discharge before even a prima facie case against the landlord is disclosed.

TALBOT J. [after stating the facts and referring to the order of the county court judge, continued :] This case involves the question whether when the statute uses the words "could be let at a higher rent," they do or do not involve the qualification that the hypothetical letting which is to be considered is a letting for the purposes for which the premises have hitherto been used ; that is to say, in this case for the purpose of a restaurant or eating-house. The Act enables a tenant who has a limited interest, after the determination of his tenancy, without any stipulation in the lease to that effect, to claim against the will of his landlord compensation for the enhancing of the value of the premises by reason of the goodwill attached to them by his exertions, or a new lease. It is in the first instance for the tenant who claims that he is entitled under the statute to show that he has satisfied the conditions of the statute. [His Lordship read s. 4, sub-s. 1, of the Act and continued :] Those are the substantive words which confer whatever right the tenant can claim in this case; they lay down in fairly explicit language what the tenant has to prove in order to establish his right to the compensation for which the Act provides. He must prove that he or his predecessors in title carried on a trade or business at the premises for not less than five years and that by reason of that the premises have acquired such a business connection and reputation that they can be let by anybody who has the power to let them for a higher rent than could otherwise be obtained for them. That is the condition on which he is entitled to compensation. In the first instance it seems a just comment on this section that if the meaning had been that the tenant was to be compensated for the loss of that which he and his predecessors had put into the place, if he proved merely that by his own and his predecessors' exertions goodwill had become attached to the premises, the section might well have stopped at the words "goodwill has become attached to the premises," and it does assist the argument which has been put forward here by the landlord to some extent that the section does not stop at that point, because the tenant undoubtedly has to prove in addition that it is by reason of this that the premises could be let at a higher rent than they would have realized if no such goodwill attached thereto. If there is a goodwill attaching to the premises, it almost follows that they will let for a higher rent for the purpose for which they have already been used—namely, the trade or business which has been carried on there. On the other hand, it is argued for the landlord that what the tenant has to prove under this Act is that by reason of the goodwill their letting value is increased and the question is a pertinent one, on what ground is that to be confined, as the county court judge has confined it, to letting as a restaurant or eating-house? That raises to some extent the question of the intention of the Legislature judged by the language which they have used. It would be a possible line of legislation to say that if a tenant has created a goodwill in premises which he has rented and that goodwill is still attached to them when his tenancy comes to an end, he is to be entitled to compensation for that when he goes out. That would give him, in a measure, a proprietary interest in the premises beyond his term, because it would give him a right to compensation after the end of the term for something which he had done to the premises, although he knew (at any rate in leases or agreements entered into before the passing of this Act) that his tenancy either would come to an end at a particular time or might be determined in a particular way. But the scheme of this Act to my mind was to prevent the appropriation by a landlord under his legal rights for his own pecuniary advantage of something which owes its origin to the exertions and skill of the tenant. It is quite plain that that matter was regarded by Parliament in passing this Act, and if so, it certainly is relevant to consider what it is that the landlord gains by coming into possession of premises to which this goodwill has become attached. He can only gain by reason of that goodwill pecuniarily, and if he lets them for any other purpose for a greater rent than they would command if let for the same purpose, goodwill and all, he has not gained a single farthing in point of money by the goodwill which has been put into the premises. Whatever else may be said about it that is an intelligible scheme of legislation, and in my opinion it is what the Legislature has said. The words used are (sub-s. 1): "by reason whereof the premises could be let at a higher rent." That is plain English, and it is certain that what the county court judge has done in correcting the decision of the referee is to modify the plain words of the Act. It is very difficult to believe that if Parliament had meant to qualify the language in the way suggested it would not have done so; at any rate we cannot speculate upon that, and the only safe rule is to go by the words which Parliament has used.

There are one or two matters by way of illustration which appear to me to support the argument for the landlord. One is the concluding words of s. 4, sub-s. 1, proviso (*a*). That proviso puts a limit upwards to the sum to be awarded as compensation for goodwill, and that limit is: "such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title"—then it goes on in these words: "and in determining such addition the tribunal shall, if it is proved that the premises will be demolished wholly or partially, or used for a different and more profitable purpose, have regard to the effect of such demolition or change of user on the value of the goodwill to the landlord." This difference between the measure of compensation according as it is looked at from the point of view of the value to the tenant of what is taken, or on the other hand the value to the person taking, is familiar to Parliament and to all who have had occasion to deal with these matters. It has arisen under innumerable Acts which have authorized the taking by compulsion of private property, and it has been settled for a very long time that in that case the measure of compensation is not the value to the buyer of what he acquires, but is the loss to the owner of what he loses. In other words you have to look at what the property was worth to the owner, and not at what the buyer acquires by the purchase. That is a familiar distinction, and I have no doubt that Parliament and those who are responsible for drawing up this Act had that in their minds in using the expression "value of the goodwill to the landlord." That goes far to show that the question to which Parliament was directing its attention was what the landlord gained by acquiring these premises at the termination of the tenancy with the goodwill on them, that is to say, how far the goodwill enhanced the value of the property which the landlord acquired. That could not be ascertained without considering, not only what the landlord could get for them for the old purpose, but for any purpose for which he was entitled to use them. Similarly if you look at proviso (*e*), although this perhaps is not quite so direct, it deals with a case where: "the value of the goodwill has been created or increased owing to restrictions imposed by the landlord, whether by agreement with the tenant or not, upon the letting for a competitive trade or business of other premises in the neighbourhood."

If the measure is only the loss to the tenant, it does not matter in the least whether the value of the goodwill which he has created has been enhanced by the immunity from competition or not; but it does very much affect the equity as between the landlord and the tenant, whether that value is to be attributed wholly to the exertions of the tenant or partly to the fact that those exertions have been employed on premises which were either partly or wholly exempted from competition.

There are other matters which might be mentioned in the Act, but it is enough for me to say that there are plenty of indications that this question was, if not *the* question, at any rate one of the questions, which Parliament had in its mind in passing this legislation, and that the insertion in the Act of these words as they stand was with that intention. It is common knowledge among those who deal with these matters that there were cases in which a landlord had penalized an energetic and successful tenant by refusing to renew his lease at the end of his term except at a greatly increased rent, that increased value of the premises of the lease of which the tenant wanted a renewal, representing really the fruit of the tenant's own exertions.

I will add one word upon the principal argument addressed to us on behalf of the tenant. It is said that if you look at s. 4. sub-s. 1, proviso (*a*), it is plain that whoever drafted it considered that the operative part of that section did not give effect to what is now in the proviso, and that if it be construed in the way in which the landlord has argued that it should be construed, that is to say according to its plain meaning, the proviso is unnecessary. In the first place, in my opinion, that is an argument the limitations of which are well known, because from the fact that ex abundanti cautela a proviso is put into a section it does not follow by any means that the section would not have meant the same thing without it. I do not say whether there is anything in this proviso which overlaps s. 4, sub-s. 1, although it is a familiar incident in statutes that some overlapping of that kind should exist, but I think it is quite possible to give an intelligible meaning to the proviso without restricting the true construction of the section. I pointed out during the argument that there is a significant difference in the language of this part of the section itself and the proviso. Under the section the tenant has to prove that owing to the goodwill the premises *could* be let at a higher rent than they would have realized if no such goodwill attached thereto. I think that there Parliament had in its mind the sort of evidence which is usual in cases of this kind, the evidence of those who look at the property and consider the neighbourhood and the conditions and say what, in their opinion, would be a rent which such premises in that neighbourhood and under those conditions would command. In the proviso the language is different, and is dealing with a matter which the landlord has to prove. The tribunal is directed that it shall: "if it is proved that the premises *will* be demolished wholly or partially, or used for a different and more profitable purpose, have regard to the effect of such demolition or change of user on the value of the goodwill to the landlord." It might well have been argued, that evidence of that kind, founded not upon a general knowledge of the property and its conditions, but upon something within the sole knowledge of the landlord, could not be considered without some such direction to the tribunal. It may well be, as was suggested by counsel for the landlord, that the way in which this proviso was intended to work in practice is that if the tenant can prove a prima facie case by his own evidence and by ordinary expert evidence, then the landlord may show that the apparent advantage which such evidence would suggest would not in fact accrue to him, because he is going to demolish the premises or demolish them partly or use them for a different or more profitable purpose, possibly owing to some exceptional bargain or conditions which he can prove.

That appears to me to be an intelligible view of this proviso, though it may be true that in part at least such a contention might have been available to the landlord without it. At any rate, the proviso is itself a clear indication that what the Legislature was dealing with was, in their own words, the value of the goodwill to the landlord.

On these grounds, the first and strongest of which is the plain language of s. 4, sub-s. 1, I cannot agree with the order of the county court judge. I think that the referee took an accurate view of his duty under the statute and that the appeal must be allowed.

FINLAY J. I am of the same opinion. I agree with all that Talbot J. has said as to the scheme of the legislation and these various provisos. I also agree with him in thinking that the matter really depends upon the construction of a few words in s. 4, sub-s. 1. The words are: "by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto." The construction appears to me to be plain, and it is impossible to read those words in the manner in which the county court judge has thought that they ought to be read without the introduction into the section of some words which would import that the hypothetical letting at a higher rent was to be the letting for the purpose for which the premises had been hitherto used. The words as they stand are susceptible of an intelligible meaning, and in accordance with the well settled and elementary principle in regard to the construction of Acts of Parliament, we ought not to introduce additional words which would be necessary if the section were to bear the meaning which the county court judge has attributed to it. I think that the county court judge made a mistake as to the construction of s. 4, sub-s. 1, and that this appeal must be allowed.

Solicitors for the defendant: *Stanley Evans & Co.*
Solicitors for the plaintiff: *Gard, Lyell & Co.*

F. P. F.

C. A.

1929

*Nov.* 28, 29.

# *In re* HIRST AND LIVERPOOL VICTORIA FRIENDLY SOCIETY.

# *In re* CLARK AND LONDON AND MANCHESTER ASSURANCE COMPANY.

*Insurance (Life)—Insurance of Children's Lives—Statutory Limits of insurable Amounts—Statements on Policies limiting Insurances within statutory Limits—Legality—Friendly Societies Act,* 1896 (59 *&* 60 *Vict. c.* 25), *s.* 62—*Friendly Societies Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 11), *s.* 2, *sub-s.* 1.

Sect. 62 of the Friendly Societies Act, 1896, enacts that a friendly society or branch "shall not insure or pay on the death of a child under five years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds 6*l.*, or on the death of a child under ten years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds 10*l.*"

Sect. 2, sub-s. 1, of the Friendly Societies Act, 1924, substitutes for the foregoing section the following: "A society or branch . . . . shall not insure or pay on the death of a child under the ages hereinafter specified any sum of money which exceeds or which, when added to any amount payable on the death of that child by any other society or branch . . . . exceeds, the amounts hereinafter specified; that is to say:—(*a*) In the case of a child under three years of age, 6*l.*; (*b*) In the case of a child under six years of age, 10*l.*; (*c*) In the case of a child under ten years of age, 15*l.*"

In 1920 H. took out a policy of industrial insurance on the life of his daughter, then aged three months, at a premium of twopence per week, and in 1925 he effected a similar policy on the life of his son, then aged one month, in each case assuring the amounts respectively set out in a Table contained in the policy. The Table in the policy of 1920 was made out on the basis of a premium of one penny per week and insured sums payable on the death of the life assured varying in amount according to age and the time the policy had been in force; it also contained the following statement: "Twopence per week will assure double the above sums provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by the Friendly Societies Act, 1896, viz., 6*l.* for children under five years of age, and 10*l.* for children under ten years of age, the sum assured shall be limited to 6*l.* or 10*l.* as the case may require." In the policy of 1925 was a statement that the amount payable under it was subject to the limitations of the Friendly Societies Act, 1924:—

*Held*, that in view of the statements in the two policies limiting the amount insured in each case to the statutory maximum, neither policy contravened the provisions of the Friendly Societies Acts, 1896 and 1924, and was valid.

In 1925 C. signed a proposal for a whole life assurance on the life of her son, then aged one year next birthday, at a weekly premium of one penny for a sum to be assured increasing as per scale up to 15*l.* On the same day she signed a proposal for an endowment assurance on the same life at a weekly premium of threepence for a " sum to be assured 7*l.* 14*s.* payable on attainment of age fifteen or in the event of previous death as per scale." Two policies were issued on the basis of these proposals. On the whole-life policy there was this memorandum: " This life is also assured under [the endowment] policy. Accordingly, the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed 6*l.* on death under age three, 10*l.* under age six, and 15*l.* under age ten " :—

*Held*, that as the above quoted memorandum cut down the sums payable under the combined policies to the statutory limit, the policies did not contravene the Friendly Societies Act, 1924, and were valid.

*Harker* v. *Britannic Assurance Co.* [1928] 1 K. B. 766 distinguished.

APPEAL from a decision of Rowlatt J. on two awards stated in the form of special cases by the Industrial Assurance Commissioner under s. 7 (*b*) of the Arbitration Act, 1889, and s. 32, sub-s. 1, of the Industrial Assurance Act, 1923.

In the first case Thomas Hirst claimed from the Liverpool Victoria Friendly Society repayment of the premiums paid by him on (*a*) a policy of industrial assurance taken out by him on April 17, 1920, on the life of his daughter, Margaret Hirst, then aged three months, at a premium of twopence per week, assuring the amounts respectively set out in the Infantile Table No. 1 printed on the policy, and (*b*) a policy of industrial assurance taken out by him on August 15, 1925, on the life of his son, Thomas Hirst the younger, then aged one month, at a premium of twopence per week, assuring the amounts respectively set out in the Industrial Branch Infantile Table No. 1a, printed on the policy. Thomas Hirst was admittedly the owner of each of the policies. The proposal for the policy of April 17, 1920, had been destroyed by the Society. The proposal for the policy of August 15, 1925, which was expressed on the policy to be the basis of the assurance, described the sum assured as " Scale " and contained no reference to any limitation of the sum assured by the operation of the statutes hereinafter referred to.

The ground of Thomas Hirst's claim was that each of the policies was illegal, inasmuch as under the former policy the Society insured a sum exceeding the amounts severally specified in s. 62 of the Friendly Societies Act, 1896, and/or s. 2, sub-s. 1, of the Friendly Societies Act, 1924, and under the latter policy the Society insured a sum exceeding the amounts severally specified in the last mentioned section. If the policies were respectively illegal, Thomas Hirst was entitled, under s. 5, sub-s. 1, of the Industrial Assurance Act, 1923, to be paid by the Society in respect of the policy of April 17, 1920, a sum equal to the surrender value of the policy to be ascertained in the manner provided by s. 29 of the said Act and the Fourth Schedule thereto, and in respect of the policy of August 15, 1925, a sum equal to the amount of the premiums paid by him.

By the policy of April 17, 1920, it was recited that if the parent of the child (therein referred to as "the assured") continued to pay the premium of the amount shown in the schedule, the society would "pay to the parent or to the personal representative of the parent if the child die under ten years of age, or to the representative of the assured . . . . if the child be aged ten or older at death, such an amount as according to the age of the assured at entrance and the duration of this policy, is ascertainable from the Infantile Table of Assurance printed below. . . . . But under no circumstances can any industrial branch policies be issued on the life of a child for amounts in the aggregate in excess of the legal limits fixed by s. 62 of the Friendly Societies Act, 1896."

The Table, which was "printed below," was made out on the basis of a premium of one penny per week and insured sums payable on the death of the life assured varying in amount according to the age of the life assured at entry and the length of time during which the policy had been in force at the date of such death. It contained in addition the following provisions: "Half the above sums may be assured by the payment of one half-penny per week. Twopence per week will assure double the above sums, provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by the Friendly Societies Act, 1896, viz., 6*l*. for children under

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five years of age, and 10*l.* for children under ten years of age, the sum assured shall be limited to 6*l.* or 10*l.* as the case may require."

By the policy of August 15, 1925, the funds of the Society were to become and be liable only in accordance with the registered rules of the Society and terms of the Table of Assurance specified thereunder "to pay to the person entitled to receive the same under such rules subject to any endorsement on this policy the benefit assured hereunder."

The Table of Assurance was made out on the basis of a premium of one penny per week and insured sums payable on the death of the life assured varying in amount according to the age of the life assured at entry and the length of time during which the policy had been in force at the date of such death. It contained in addition the following provision: "Half the above sums may be assured by the payment of one half-penny per week. Twopence per week will assure double the above sums, except that the amount payable under this policy is subject to the following limitations of the Friendly Societies Act, 1924: (*a*) In the case of a child dying under three years of age, not more than 6*l.*; (*b*) In the case of a child dying under six years of age, not more than 10*l.*; and (*c*) In the case of a child dying under ten years of age, not more than 15*l.*"

The Society admitted that, while the sums assured for one penny per week were within the statutory limits which were respectively in force at the date of the issue of the respective policies and which were now in force, the sums assured for twopence per week, save for the said limitation, would exceed in certain cases such statutory limits.

Thomas Hirst contended that each of the said policies was illegal for the reasons given above, and in accordance with the decision of a Divisional Court of the King's Bench Division in the case of *Harker* v. *Britannic Assurance Co.* (1)

The Society contended that neither of the policies was illegal, and that the decision in *Harker* v. *Britannic Assurance Co.* (1) did not apply to either of them. The

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operative part of the policies in each case, which constituted the assurance, was limited to the amounts respectively specified in the Table, and the Table itself in each case, by reason of the additional provision set forth in the policies themselves, limited the amount assured for twopence per week to amounts within the statutory limits. There was therefore no assurance in excess of such statutory limits. The operative part of each of the policies and the Table therein referred to in *Harker* v. *Britannic Assurance Co.* (1) contained no such limitation, but there was merely a subsequent proviso in each case that the statutory limitations should apply to the policy.

The question for the opinion of the Court was whether the said policies or either of them were or was illegal.

In the second appeal the facts were these: On February 2, 1925, Mrs. Suzanne Clark signed a proposal with the company for a whole-life assurance on the life of her son, Paul Clark, aged one year next birthday, at a weekly premium of one penny, for a "sum to be assured increasing as per scale up to 15*l.*" (thereinafter called the whole-life policy). The proposal contained two questions which are material: "Is the child already assured in this office?" and "Is the child assured in any other office?" and there was a note referred to by an asterisk appended to the second question, and to the second question only: "The maximum sums permissible by law to be paid on the death of a child are 6*l.* under three years of age, 10*l.* under six years of age, and 15*l.* under ten years of age; assurances for any larger totals can come into operation after the attainment of age ten." On the same date Mrs. Clark signed a proposal with the company for an endowment assurance on the same life at a weekly premium of threepence, for a "sum to be assured 7*l.* 14*s.* 0*d.* payable on attainment of age 15 or in the event of previous death as per scale" (thereinafter called "the policy of endowment assurance"). The two questions and note were the same as in the proposal previously referred to.

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On the basis of the said respective proposals policies both dated February 2, 1925, were issued to Mrs. Clark, who was the owner thereof. By the whole-life policy, numbered 11009074, it was provided that, if the Company received the premium as stated in the schedule at the times and in the manner therein specified, it would, on due proof of the death of the life assured described in the schedule and of his or her age and of title, pay the sum assured according to the Table thereunder to the proposer or to the personal representative of the proposer. There was endorsed on the policy a memorandum in the following terms: "Memo: This life is also assured under policy numbered 11009073. Accordingly, the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed 6*l.* on death under age three, 10*l.* under age six, and 15*l.* under age ten."

By the policy of endowment assurance, numbered 11009073, it was witnessed that, provided the Company received the premium as stated in the schedule at the times and in the manner therein specified, it would, on due proof of the occurrence of the event described in the schedule, and of the age of the life assured also described in the schedule, and of title, pay the sum assured to the proposer or to the personal representative of the proposer. Each policy further provided: "And it is hereby further agreed and declared that the contract between the parties hereto is completely set forth in this policy and proposal therefor, taken together, and that none of its terms can be modified nor any forfeiture under it waived except by endorsement hereon signed at the Company's chief office by a director of the Company."

If the endorsement on policy No. 11009074 was left out of consideration, the sums payable under the said policies on the death of the life assured under the age of ten years together exceeded in certain cases the amounts which might lawfully be paid on the death of a child under the age of ten years by virtue of s. 62 of the Friendly Societies Act, 1896, as applied by s. 4, sub-s. 1, of the Industrial Assurance Act, 1923.

Mrs. Clark claimed, under s. 5, sub-s. 1, of the Industrial Assurance Act, 1923, a sum equal to the amount of the premiums paid by her on each of the above policies, on the ground that, having been issued after the commencement of the said Act, that is to say after January 1, 1924, they were illegal as insuring a sum in excess of the amount permitted by the statute. It was argued on her behalf that as both the policies were issued at the same time and together assured a sum in excess of the amount permitted by the said statutes in accordance with the proposals which were expressed to be the bases of the contracts, they were both of them illegal and that the endorsement of the memorandum on policy 11009073 was ineffective in accordance with the decision in *Harker* v. *Britannic Assurance Co.* (1)

It was argued on behalf of the Company that the effect of that memorandum was to bring the sums assured by the two policies together within the amount permitted by the said statutes, that it was a definite modification, signed by one of the directors of the company and endorsed on the policy, of the terms of the assurance as set out in the schedule to the whole-life policy and not merely a proviso calling attention to the provisions of the statutes, as in *Harker's* case. (1)

The question for the opinion of the Court was whether the policies or either of them were or was illegal.

Rowlatt J. held that the decision in *Harker* v. *Britannic Assurance Co.* (1) governed each of the cases and that the policies were illegal.

The insurance companies in each case appealed.

*Gavin Simonds K.C.* and *Blanco White* for the appellants. The question in these cases is whether the sum assured is in excess of the statutory limits. Rowlatt J. held that *Harker's* case (1) governed these and that they were illegal. No canon of construction was laid down in *Harker's* case (1) unless by Branson J., who said that the proviso there in question had no contractual effect. Here the policies are entirely different from that in *Harker's* case (1); the contracts are to pay certain amounts on reference to certain Tables and certain restrictions on the amounts payable are clearly imposed. It is a matter of contract between the parties what the amounts insured are.

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*Sir George Jones* (*Sir Walter Greaves-Lord K.C.* with him) for the respondent in the first appeal. The insurances are beyond the statutory limit and therefore illegal. The proposal form which formed the basis of the insurance contained no reference to any limitation on the amounts payable. The assured was not clearly told that the insurance would not be for more than the statutory limit. The memorandum on the policy is not contractual. The policies are governed by *Harker's* case. (1)

The respondent in the second appeal was not represented.

Scrutton L.J. These two cases raise important questions, having regard to the Friendly Societies Acts, 1896 and 1924, as to policies of insurance on the lives of children. In the past there has been, and possibly there still is, a good deal of abuse in connection with such policies. Among the lower classes the death of a child has sometimes been regarded as a benefit to the parents, owing to the fact that an insurance had been effected on the life of the child; and undoubtedly there have been cases where the existence of a policy has not tended to prolong the life of the child. This has been recognized by Parliament, which by s. 62 of the Friendly Societies Act, 1896, enacted that " a society or branch . . . . shall not insure or pay on the death of a child under five years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds 6*l.*, or on the death of a child under ten years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds 10*l.*" That section does not expressly deal with the case where the policy of the one company exceeds 6*l.* or 10*l.*; it deals on the face of it with the case where the policy added to another policy exceeds 6*l.* or 10*l.* We need not, however, trouble about that, for if there was a loophole in the section, it was stopped by the Friendly Societies Act, 1924, s. 2, sub-s. 1, which substituted for the earlier section the following: "A society or branch . . . . shall not insure or pay on the death of a child under the ages hereinafter specified any sum of money which exceeds or which, when added to any amount payable on the death of that child by any other society or branch . . . . exceeds, the amounts hereinafter specified; that is to say:—(*a*) In the case of a child under three years of age, 6*l.*; (*b*) In the case of a child under six years of age, 10*l.*; (*c*) In the case of a child under ten years of age, 15*l.*" Going back now to s. 62 of the Act of 1896 we find that the society, in the cases there referred to, is not to insure, that is, is not to issue a policy, and is not to pay. The society is not to pay on the death and must not pay on the death even though the policy does not require it to do so; it must not seek to evade the Act by paying though the policy does not legally require it to pay. That being the position, it is necessary in these appeals to have regard to each policy, for it is quite possible that the policy of one company may, whereas the policy of another company may not, contravene the section. One policy might be in these terms: "We, the company, insure for 2*d.* a week double the sum on a Table where that amount would not exceed so much, but if that amount would exceed so much we only insure 6*l.* or 10*l.*; we have a policy which in certain events insures double the amount, and in certain events insures only the statutory maximum." In such a case, if the policy were properly worded, the company would not be insuring a sum exceeding 6*l.* in the case of the death of a child under five years of age, because the policy would expressly say: "In the case of the death of a child under five years of age we only insure so much." The question which arose in *Harker* v. *Britannic Assurance Co.* (1) turned largely on the form of the policy which said: "Whereas the proposer is desirous of effecting an insurance for such sum as is

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determined by the Table appearing in column 4 of the said schedule, Now this policy witnesseth that the funds shall be liable to pay the sum assured." According to the Table more would be paid than the statutory maximum in the case of the death of a child under five years of age or under ten, but the policy contained this further clause: "Provided always that the provisions of the Act of Parliament enacting that no greater amount than the sum of 6*l*. shall be paid on the death of a child under the age of five years or than the sum of 10*l*. on the death of a child under the age of ten years shall apply to this policy." The company could hardly do anything else, but it is an odd way of wording a policy to say: "We make this policy subject to an Act of Parliament which shall apply to the policy we are making." The Divisional Court in that case held that the policy was illegal, because it assured the sum stated in the Table which exceeded the statutory maximum permitted, and that the proviso to the policy was not a contractual term but was a mere statement of fact that there existed an Act of Parliament which, whether the company agreed or not, must apply to the policy. Avory J. expressed some doubt on the point; the Lord Chief Justice and Branson J. apparently entertained no doubt. In the cases now before us the question is, Is the policy in each instance one prohibited by the statute? The decision in *Harker* v. *Britannic Assurance Co.* (1) has no binding force in a Court bound by decisions of the Divisional Court unless the policy to be construed is in the same, or in substantially the same, form as in that case; here the question not being whether that case is wrong, but whether the particular policy under consideration is one which is prohibited by the statute. In passing, however, I may say that there is a good deal to be said for the contention which failed in *Harker's* case (1)—namely, that the proviso to the policy in that case, although oddly expressed, was really a contractual term. Whether that case was rightly decided or not it is unnecessary for us to say, partly because probably every company has now altered its form of policy, and

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because that case applies only to a policy in substantially the same form.

In the first case which we have to consider there are two policies on two children who were spoken of during the argument as Margaret and Thomas. The policies are in different forms. In that on the life of Margaret the policy provided that in consideration of the proposal and the payment of the premium it was agreed that if the premium was paid, the Society promised to pay to the parent such a sum as according to the age of the assured at entrance was ascertainable from the Infantile Table of Assurance printed below. Turning to that Table I find between two thick lines an Infantile Table of Assurance beginning with sums assured by the payment of 1*d.* per week. The sums assured by that payment do not involve any breach of the statute. The breach is committed if there is a payment of a premium of 2*d.* per week on the sum in the Infantile Table of Assurance, but in a footnote are the following words: "Twopence per week will assure double the above sums, provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by the Friendly Societies Act, 1896, viz., 6*l.* for children under five years of age, and 10*l.* for children under ten years of age, the sum assured shall be limited to 6*l.* or 10*l.* as the case may require." The effect of that clause, the draftsmanship of which is not beyond criticism, appears to be this: "For 2*d.* we are insuring those sums except in cases where they would exceed the statutory limit, in which case the sum assured shall be restricted to that limit." That seems to be substantially the same as the provision: "We assure the said sums except in the named cases, in which we only assure so much." Read in that way, and I think it should be so read, there seems to me to be no insurance which contravenes the Act. The insurance in the case of children dying under five or under ten is limited to a named sum; that does not infringe the provisions of the Act; and therefore, whether *Harker's* case (1) was rightly decided or

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not, the policy in Margaret's case does not contravene the Act.

I come now to the policy on the life of Thomas. Incidentally I may say that this, like the former policy, is a very formidable document to give to a working man. Any one who tries to read the very close print which fills two large pages will have considerable difficulty in reading it, and I very much doubt whether when he had read it he would understand it. The policy in the case of Thomas is worse than the other, because not only does it set out all the rules but likewise a large number of the provisions of the statute, so that the unfortunate working man is offered four pages of closely printed matter to read. On the back of the policy, however, in very large letters which probably the working man will look at is this printed statement: "Not more than 6*l.* under three, 10*l.* under six, and 15*l.* under ten can be recovered"; but turning to the policy itself I find that whereas a proposal has been made, the policy witnesseth that if the premium is paid the funds of the Society shall become liable in accordance with the terms of the Table of Assurance specified thereunder. Immediately under that Table I find this: "The special attention of the member is directed to the provisions of the Industrial Assurance Act"; and in the Table itself provision is made for the payment of 1*d.* per week, which it is agreed does not contravene the Act; then comes this: "Twopence per week will assure double the above sums, except that the amount payable under this policy is subject to the following limitations of the Friendly Societies Act, 1924." Then follow the three: under three years not more than 6*l.*; under six, not more than 10*l.*; under ten, not more than 15*l.* Personally I have had more doubt than my brothers about this clause, and at one time I was inclined to think that a provision that "we will assure double the above sum, but the amount payable will be less because of the Friendly Societies Act," was dangerously near the *Harker* case (1) if that case was rightly decided, because it appears to draw a distinction between

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insurance and payment, and to say "we assure double the sums, but we only pay parts." By the section a society is forbidden to insure as well as forbidden to pay in the circumstances there set out. While, as I say, I have entertained some doubt whether this form can be satisfactorily distinguished from *Harker's* case (1), and while I think the Society should have it redrafted, I have, on consideration, come to the conclusion that inasmuch as the limitations are included in the Table of the amount which is to be paid, and as the section is a penal one and therefore to be construed against those who put it forward and in favour of those accused of an infringement of the section, I think the form is contractual, and that the Society is only insuring and undertaking to pay no more than the statutory limit.

In the second appeal, in which we have not had the benefit of any argument for the respondent, there are two policies, one a whole life policy which does not infringe the provisions of the Act, and, concurrently with it, and taken out on the same day, an endowment policy, the effect of the two together being that unless there is some limitation made a term of the contract they infringe the Act. On the second policy there appears the following memorandum: "This life is also assured under policy numbered 11009073. Accordingly, the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed 6*l.* on death under age three, 10*l.* under age six, and 15*l.* under age ten." Again, while the draftsmanship might have been better, I think there is in the case of children dying under the age of ten an assurance only of the maximum sums payable under the Act, and not of the full sums assured printed in the schedule.

For the reasons I have given none of the policies in question are illegal, and the appeals must be allowed.

LAWRENCE L.J. I agree that these appeals succeed. The first relates to two policies taken out by Thomas Hirst, one

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on the life of his infant daughter Margaret, the other on the life of his infant son Thomas. The policy on the life of Margaret was taken out in 1920, before the Friendly Societies Act, 1924, was passed; and the policy on the life of Thomas in 1925, after the passing of that Act. In respect of each policy the question is whether it insures a sum in excess of the statutory limit. It is admitted that under s. 2, sub-s. 1, of the Act of 1924, the Act of 1896 must be read as if the provisions of the Act of 1924 had been originally inserted in the Act of 1896, and therefore that, so far as the relevant statutory provisions are concerned, there is no difference in the law applicable to the two policies. Rowlatt J. has held that the decision in *Harker's* case (1) applies to these policies and accordingly that they are illegal. In my opinion that conclusion is erroneous. In *Harker's* case (1) the question turned upon a clause in each of the three policies there in question, which differs essentially from the provisions to be found in either of the present policies. In *Harker's* case (1) the Divisional Court came to the conclusion that the clause under consideration amounted to nothing more than a statement that the law should apply to the policy in which it was inserted, and that it was therefore nugatory. That case is clearly distinguishable from the present, and it is unnecessary to consider whether it was rightly decided or not—a question upon which I express no opinion.

In the present case the policy on the life of Margaret contains a Table of the amounts which will become payable out of the funds of the Society on payment of one penny per week. The Table is followed by a statement that "twopence per week will assure double the above sums, provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by the Friendly Societies Act, 1896, viz., 6*l.* for children under five years of age, and 10*l.* for children under ten years of age, the sum assured shall be limited to 6*l.* or 10*l.* as the case may require." I read that clause as meaning that the sum assured and payable under the policy is double

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the amount mentioned in the Table except in any case where such double amount would exceed the limits allowed by the Act of 1896, in which case the sum assured shall be cut down, and the maximum amount allowed by the Act shall be substituted for it. If that be the right construction, there is no contract by the Society to insure or to pay a sum of money exceeding the statutory limit, and the policy is perfectly legal.

The policy on the life of Thomas, after setting out a Table specifying the sums assured on payment of a premium of one penny per week, there is this statement: "Twopence per week will assure double the above sums, except that the amount payable under this policy is subject to the following limitations of the Friendly Societies Act, 1924: (*a*) in the case of a child dying under three years of age, not more than 6*l.*; (*b*) in the case of a child dying under six years of age, not more than 10*l.*; and (*c*) in the case of a child dying under ten years of age, not more than 15*l.*" Here, again, I read that provision as meaning that in any case where the double amount would exceed the statutory limit, the sum assured shall be cut down, and the maximum statutory amount be substituted for it. Of course under this policy, as well as under the policy on the life of Margaret, the double amount will be payable if that amount does not exceed the statutory limit; but in each case the proviso operates to cut down the sum assured to the statutory limit if the double amount would exceed that limit. In the result both these policies are in my opinion valid.

The second appeal raises a somewhat different question. It relates to two policies taken out by Mrs. Suzanne Clark in respect of her infant son Paul. The first policy in order of date, although both were taken out on the same day, was an endowment policy insuring a sum payable on attainment by Paul of the age of fifteen years, or in the event of his previous death, the premium being 3*d.* per week. That policy does not infringe the statutory limit of infantile assurances. The other policy was a whole-life assurance of the same child on payment of a premium of a penny per week, and it contained the following memorandum, which has to be read as a proviso inserted in the policy: "This life is also assured under policy numbered 11009073"—that refers to the endowment policy to which I have referred—"accordingly, the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed 6*l.* on death under age three, 10*l.* under age six, and 15*l.* under age ten." What does that clause mean? As I read it, it means this: "Having granted you an endowment policy in respect of your son Paul under which a sum of money will become payable we are now granting you a life assurance policy in respect of the same infant and if these two policies are combined the result is that in certain events we may be contracting to pay you a sum which exceeds the statutory limit. We therefore make this condition, that in case that event should happen we will pay you no more under both policies than the maximum sum which the statute permits us to pay." How the amount actually payable would be ascertained in case the proviso became operative is not a matter which need now be considered, but so far as I can see there would be no practical difficulty in doing this. In my opinion the effect of the memorandum is to cut down the total amount payable under both policies (which are to be treated as being combined for this purpose) to the statutory limit, and that the contract of insurance which the company has entered into is one which is within that limit.

For these reasons I am of opinion that the policies, the subject-matter of the second appeal, are valid, and do not contravene s. 62 of the Act of 1896 as amended by s. 2, sub-s. 1, of the Act of 1924.

Greer L.J. I agree with the judgment delivered by Scrutton L.J. not only in the conclusions at which he arrived but also in the cogent reasons by which he supported those conclusions. I do not, however, share his doubt about the application of those reasons to the policy on the life of Thomas Hirst. It seems to me that that particular

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policy is a promise to pay a certain sum upon the happening of a certain event. Every life policy is a contract to pay a certain sum on the happening of a certain event, and in order to bring this policy within the prohibition of the Acts of Parliament that have been referred to, it is necessary to show that there is contained in it a promise to pay more than 6*l.* in the case of a child dying under the age of three, a promise to pay more than 10*l.* in the case of a child dying under the age of six, or a promise to pay in the case of a child dying under ten more than 15*l.* I can find no indication in the policy of any such promise. The promise is to pay that which is mentioned in the Table. That Table deals with the amount which is promised in consideration of a premium of a penny, and the Table, until we come to the added words, does not deal with the amount to be paid as a consideration for a premium of twopence. In order to obtain the Society's promise to pay in consideration of the premium of twopence, the words at the foot of the Table must be read, and I read them as meaning: "We, the Society, promise to pay double the above sums in the Table in all cases where those sums do not exceed 6*l.*, 10*l.* or 15*l.* in the appropriate cases, but in those cases we promise to pay only 6*l.*, 10*l.* or 15*l.*" I agree that the appeals should be allowed.

*Appeals allowed.*

Solicitors for appellants: *Kingsley Wood, Williams & Co.*
Solicitor for first respondent: *J. R. Cort Bathurst.*

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## OSBORN *v.* THOMAS BOULTER AND SON.

[1929. O. 1917.]

*Defamation—Libel—Privileged Occasion—Publication to Clerk of Person exercising Privilege—Reasonable and ordinary Course of Business.*

If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business; and it is in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist, even although these letters contain statements defamatory of a third person.

*Pullman* v. *Hill & Co.* [1891] 1 Q. B. 524 not followed.

*Edmondson* v. *Birch & Co., Ld.* [1907] 1 K. B. 371 followed.

Per Scrutton L.J.: *Pullman* v. *Hill & Co.* (supra), where it was held that at the time of that decision it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk, was merely a decision of fact.

*Semble* (per Scrutton and Slesser L.JJ.): Where a document containing defamatory statements is published by being read out to a third person, or where the publication of the defamatory statement is to a clerk to whom it is dictated, the communication in either case amounts to slander and not to libel.

*Semble* (per Greer L.J.): Such communication amounts to libel.

Appeal from a decision of Horridge J.

The plaintiff was tenant to the defendants of the Royal Oak Inn, Kidderminster, and by his tenancy agreement was bound to sell only beer supplied by the defendants, who were brewers. On November 16, 1929, the plaintiff wrote the following letter to the defendants: "Dear Sir, I would like you to pay attention to the way my beer order was dropped which is due to the poor quality beer you have been sending me. Now I have asked you several times to remedy it and when Mr. Blakeway came to see it he made many promises, but I am still in the same hopeless mess as before and you know one cannot trade on promises so this is the last time I am going to write to you on this matter as it seems very hard to do business with you." Upon that the defendants sent one Blakeway, one of their employees, to investigate the complaint and to see the plaintiff's premises. Thereafter, on November 27, 1929, Mr. Boulter, one of the defendant firm, dictated to his typist the following answer to the plaintiff's letter: "Dear Sir, In further reference to yours of the 16th inst., in which you grumble at the quality of the beer, we are sorry to say we have heard rumours that you are adding water to it, we won't say how, and if this is so no doubt the people would grumble about the beer. We can only tell you that if you resort to these kind of measures you are running yourself liable to heavy fines and penalties, as if Mr. Cowdry, the Food and Drugs Inspector, were to get on your track you would catch it. Besides this, we do not countenance this in any shape or form whatever. We do not want our good beer spoilt and if you will retail it as we send it out you should do the best trade in the street, the same as this house has always done." When Mr. Boulter had dictated the letter he said to Blakeway, who was also present, "Is that right?" to which Blakeway said, "Yes." The letter was then transmitted to the plaintiff, who thereafter brought this action, alleging that the defendants falsely and maliciously wrote the letter of the plaintiff in the way of his business and published the same to certain clerks and/or typists in their employment.

By their defence the defendants said that the words complained of were not defamatory; that they were written and published in answer to the plaintiff's letter of November 16, 1929, wherein he complained of the quality of the beer supplied to him by the defendants; that as the plaintiff was the defendants' tenant and bound to sell only beer supplied by them, the defendants and the plaintiff had a common interest in the quality of the beer, in complaints made by the plaintiff's customers, and in the rumours referred to in the words complained of; that the words complained of and the occasion of their publication were privileged. The defendants further said that in so far as the words might be held to allege that the plaintiff had in fact added water to beer supplied to him by the defendants, the words were true in substance and in fact. Further, they said that the plaintiff had not suffered any damage.

At the trial, which was tried without a jury, Horridge J. held that the defendants had failed to justify the allegation that the plaintiff had watered the beer supplied by him to his customers; he held, further, that the presence of Blakeway in the room when the letter of November 27 was read out prevented the occasion being privileged. There was a conflict of recollection between counsel whether the judge also held that the communication of the letter to the typist destroyed the privilege. On his findings he gave judgment for the plaintiff for 500*l.*

The defendants appealed.

*Eales K.C.* and *Arthur Ward* for the appellants. Horridge J. was wrong in holding that the communication of the letter of November 27 by the appellants to the typist and Blakeway destroyed the privilege. *Pullman* v. *Hill & Co.* (1), which appears to decide the contrary, cannot now be considered good law in view of the later authorities. In *Edmondson* v. *Birch & Co., Ld.* (2), Cozens-Hardy L.J. said (3): "If we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." In the same case Fletcher Moulton L.J. said (4): "If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable

(1) [1891] 1 Q. B. 524.
(2) [1907] 1 K. B. 371.
(3) [1907] 1 K. B. 381.
(4) Ibid. 382.

and usual course of business." Those observations are directly applicable to the facts of this case, the letter complained of having been dictated to the typist in the ordinary course of business, and having been referred to Blakeway to ascertain whether it was correct. The same view was expressed in the later case of *Roff* v. *British and French Chemical Manufacturing Co.* (1) Whatever may have been the practice in 1890, when *Pullman* v. *Hill & Co.* (2) was decided, certainly the practice is now for business men to dictate all their business letters and not to write them with their own hand.

*Sullivan K.C.* and *J. F. Bourke* for the respondent. Notwithstanding what may have been said of *Pullman* v. *Hill & Co.* (2) in later cases, it is absolutely on all fours with the present case, and therefore governs it. As Lopes L.J. there said (3) : "I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences." Here it cannot be said that it was reasonably necessary and in the ordinary course of business for the appellants to communicate the letter complained of to the typist or to Blakeway. In *Edmondson* v. *Birch & Co.* (4) it was reasonably necessary for the defendants for the protection of their own interests to communicate the telegram to a clerk for coding purposes. In *Roff* v. *British and French Chemical Manufacturing Co.* (1) the question of publication to clerks did not arise.

[*Boxsius* v. *Goblet Frères* (5) was also referred to.]

SCRUTTON L.J. In this case, as the facts do not sufficiently appear in the papers, we might have had some difficulty were it not that counsel have substantially agreed as to what happened in the Court below. The facts as agreed are these : The plaintiff in the action, the respondent in

(1) [1918] 2 K. B. 677.
(2) [1891] 1 Q. B. 524.
(3) [1891] 1 Q. B. 524, 530.
(4) [1907] 1 K. B. 371.
(5) [1894] 1 Q. B. 842.

this appeal, was the lessee of a public house which was supplied with beer by the appellants, who are brewers. On November 16 the respondent wrote a letter to the appellants in these terms: "I would like you to pay attention to the way my beer order was dropped which is due to the poor quality beer you have been sending me. Now I have asked you several times to remedy it and when Mr. Blakeway came to see it he made many promises, but I am still in the same hopeless mess as before and you know one cannot trade on promises so this is the last time I am going to write to you on this matter as it seems very hard to do business with you." That is an allegation that the brewers were supplying beer of poor quality. Mr. Boulter, a member of the appellant firm, after consulting Mr. Blakeway and sending him to see the respondent's premises, when a suggestion seems to have been made that the respondent was not keeping his cellars at a proper temperature, wrote the following letter to the respondent on November 27: "In further reference to yours of the 16th inst., in which you grumble at the quality of the beer, we are sorry to say we have heard rumours that you are adding water to it, we won't say how, and if this is so no doubt the people would grumble about the beer. We can only tell you if you resort to these kind of measures you are running yourself liable to heavy fines and penalties, as if Mr. Cowdry, the Food and Drugs Inspector, were to get on your track you would catch it. Besides this, we do not countenance this in any shape or form whatever. We do not want our good beer spoilt and if you will retail it as we send it out you should do the best trade in the street, the same as this house has always done." That is the letter complained of and, unless it is privileged, it is obviously actionable, inasmuch as it alleges that he deliberately watered his beer. It is fair to the respondent to say that the appellants failed to justify this allegation, so the respondent is free from the imputation that he watered the beer he supplied to his customers. The letter, however, can give rise to no cause of action unless it was published to some third party. The respondent pleaded that the letter was written maliciously, and that it was published to certain persons in the appellants' employment. It appears that Mr. Boulter dictated the letter to a lady typist, and then, at Mr. Boulter's request, she read out the words she had written, Blakeway being also then present. Mr. Boulter said to Blakeway, "Is that right?" and Blakeway said, "Yes." On that a question may arise, as to which at present I express no opinion except to say that it must not be taken that I am clear that there was in what happened any publication of a libel. What Mr. Boulter dictated to the typist appears to be a slander, and on the question whether when the typist read out what she had written that constituted a slander or libel I can only say that notwithstanding *John Lamb's* case (1) the text writers appear to think it a slander and not a libel. I therefore do not wish this to be a decision that on the state of facts with which we are concerned what happened was the publication of a libel. To me it appears to be a slander.

At the trial, at the end of the plaintiff's case counsel for the appellants submitted that no case had been made out, because the occasion of the publication being a communication between the respondent, who alleged that bad beer had been supplied to him, and the brewers, who were protecting their own interests by repudiating the suggestion of bad beer and suggesting another cause for its inferior quality, was privileged. There is a slight difference in the recollection of counsel as to what the judge then said. They agree that he said that he was going to hold that the presence in the room of Blakeway destroyed the privilege; they differ as to whether he also said that the communication of the letter to the typist destroyed the privilege. The judge went on to say to the defendants: "You must prove your justification." They tried to do so, and in the opinion of the judge failed; and the judge said nothing more about privilege.

Mr. Sullivan has addressed us with great vigour in support of the proposition that *Pullman* v. *Hill & Co.* (2) has decided this case, and he made that submission in spite of three

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(1) (1611) 9 Rep. 59b.

(2) [1891] 1 Q. B. 524.

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subsequent decisions of the Court of Appeal. *Pullman* v. *Hill & Co.* (1), he contends, still survives as a decision on law which governs this case. In my view, on the question whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this Court after a consideration of *Pullman* v. *Hill & Co.* (1) in *Edmondson* v. *Birch & Co., Ld.* (2), and again adopted in this Court in *Roff* v. *British and French Chemical Manufacturing Co.* (3) In *Edmondson* v. *Birch & Co., Ld.* (2), a company in England wrote and cabled to a company in Japan about the character of a person whom it was proposed to employ. The letter and cable, which contained defamatory matter, were, in the ordinary course, communicated to the clerks of the company sending the letter and cable, by dictation, copying and coding. Collins M.R., after considering the previous cases of *Pullman* v. *Hill & Co.* (1) and *Boxsius* v. *Goblet Frères* (4), said (5): "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege." Cozens-Hardy L.J. said (6): "I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company

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(1) [1891] 1 Q. B. 524.
(2) [1907] 1 K. B. 371.
(3) [1918] 2 K. B. 677.
(4) [1894] 1 Q. B. 842.
(5) [1907] 1 K. B. 380.
(6) Ibid. 381.

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or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." Fletcher Moulton L.J. said (1): "I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business." The same was said in *Roff* v. *British and French Chemical Manufacturing Co.* (2) If the principle is as there laid down, the decision in *Pullman* v. *Hill & Co.* (3) is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk. In the opinion of the Court of Appeal in that case if a member of a business firm wished to send such a letter he must write and copy it himself. That is a decision of fact. The principle laid down in *Edmondson* v. *Birch & Co., Ld.* (4), applies, while the decision on fact is not binding on any Court in 1930. I am glad to find that in Salmond on Torts and in Odgers' Libel and Slander the same view is taken of *Pullman* v. *Hill & Co.* (3) as an authority. If the principle laid down in those later cases is what we have to apply, how is it to be applied to the present case? Brewers supplying beer and a licensee who receives it are quarrelling about its character. That is clearly a privileged occasion within the principle laid down in *Toogood* v. *Spyring* (5), because it is the interest of one party to defend himself and the interest of the other to receive and consider the defence. Is the privilege lost where a man defending himself and making charges against another reads a letter to his servant on whose information he is making the charges, and says, "Is that correct?" I think that it is clearly not lost in those circumstances. Then, is it lost because in 1930 a man writing such a letter dictates it

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(1) [1907] 1 K. B. 382.
(2) [1918] 2 K. B. 677.
(3) [1891] 1 Q. B. 524.
(4) [1907] 1 K. B. 371.
(5) (1834) 1 Cr. M. & R. 181.

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to a typist who reads it out from her notes? Applying *Edmondson* v. *Birch & Co., Ld.* (1), that appears to me to be a reasonable way of making a communication to another party, even though the letter contains defamatory statements. Acting therefore on the authority of that decision and applying it to the facts of this case, it seems to me (1.) that the occasion on which the letter was written was privileged; (2.) that the protection was not lost by a communication of the contents of the letter to Blakeway, the communication to him being to ascertain whether the letter was justified in view of his report; and (3.) that the protection of the privileged occasion was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they may contain defamatory statements. The judge ought at the end of the plaintiff's case to have entered judgment for the present appellants, and judgment must now be entered for them. The appeal will therefore be allowed.

GREER L.J. I am of the same opinion. The plaintiff in the present case was the defendant's tenant and licensee of a public house, the defendants being brewers. It was not necessary for the defendants to rely upon the occasion on which the letter in question was written being a privileged occasion as regards publication to the plaintiff himself, because that is not a publication in law of which the plaintiff can complain. But it is none the less true that the occasion on which the letter was written was one which the law regards as privileged, because it was one in which it was the interest of the defendants to write the letter, and the interest of the plaintiff to know what view the defendants were taking of the question that had arisen—namely, who was responsible for the bad quality of the beer. We approach this case therefore from the point of view that the occasion was privileged, and the question is whether publication of the letter to the defendants' servants in the ordinary course of business deprives the defendants of the defence of privilege. Great

(1) [1907] 1 K. B. 371.

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reliance was placed by Mr. Sullivan on *Pullman* v. *Hill & Co.* (1), and I go with the argument thus far that if that case had never been commented upon or distinguished, and if it is to be regarded as laying down the law to be applied to letters and communications written in a merchant's or business man's office, it is decisive of this case. But the general methods of business may be quite different in 1929 from what they were in 1890. Where a question arises in 1930, as regards matters which took place in 1929, the inference to be drawn by a judge as to what are the reasonable methods of conducting a business is not the same question as that which had to be decided in 1890. I am not quite clear that if I had been sitting in the Court of Appeal in 1890 I should have drawn the same inference as was drawn by the judges who decided *Pullman* v. *Hill & Co.* (1), but the question now is what is the proper inference to be drawn in 1929, especially having regard to the views that have since been expressed by the Court of Appeal in other cases? I take it that the law to be applied is correctly stated by Cozens-Hardy L.J. and Fletcher Moulton L.J. in *Edmondson* v. *Birch & Co., Ld.* (2), which was expressly approved by Swinfen Eady M.R. in *Roff* v. *British and French Chemical Manufacturing Co.* (3), where he said (4): "With regard to the authorities, it was urged on behalf of the plaintiff that the mere fact that a defamatory communication, prima facie privileged, is communicated to a third person destroys the privilege. In my opinion that proposition cannot be maintained. The case of *Pullman* v. *Hill & Co.* (1) has been dealt with many times since the date of its decision. It was qualified and distinguished by Lord Esher in *Boxsius* v. *Goblet Frères* (5), and it was further dealt with by the Court of Appeal in *Edmondson* v. *Birch & Co., Ld.* (6), where the rule was laid down in these terms by Cozens-Hardy L.J.: 'The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business.' And Fletcher Moulton L.J. said (1): 'If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.'" I take that statement of Fletcher Moulton L.J. to be now a rule of law applicable to cases of the kind we have to consider in this case. I have come to the conclusion that no one could possibly say that at the present time or when this letter was written it was other than a reasonable and usual course of business for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist, and, accordingly, I hold that the dictation to the typist of the letter in question if a libel and not slander—I am inclined to think that it would be a libel—was on a privileged occasion, and cannot be complained of unless it could be shown to have been written maliciously. I am not sorry to come to this conclusion in this case, because it seems to me a very extraordinary result that a person should get a sum of 500*l*. for an alleged libel when the only publication complained of was publication to a clerk who wrote the letter at the dictation of Mr. Boulter. The publication complained of was in the reasonable and usual course of business. For these reasons I think the appeal should be allowed and judgment entered for the defendants.

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(1) [1891] 1 Q. B. 524.
(2) [1907] 1 K. B. 371.
(3) [1918] 2 K. B. 677.
(4) [1918] 2 K. B. 681.
(5) [1894] 1 Q. B. 842.
(6) [1907] 1 K. B. 371, 382.

SLESSER L.J. I agree that the appeal should be allowed for the reasons stated by Scrutton L.J. I only desire to add that in my mind there is considerable doubt whether the publication was a slander or a libel. It may well be that the circumstance of dictation, and the dictated matter being brought back and considered by the dictator, may constitute in certain cases a libel, but in this case I can see no evidence that the dictated matter was ever brought back for consideration by Mr. Boulter. The evidence is that Mr. Boulter dictated the letter, Blakeway being present, and he saying (when asked by Mr. Boulter if it was all right), that it was. That looks as if the question had been asked at the time of the dictation and not after its reduction to writing. It may be that the only communication between Mr. Boulter and the typist was the bare dictation of the letter. I agree with the passage in Salmond on Torts, 7th ed., p. 530, where it is said: "The contents of a written document may be published either by allowing some one to read the document for himself or by reading it out to him. It is submitted, however, that this latter mode of communication amounts to slander only, and not to libel. A defamatory statement may be published by being dictated to a clerk, shorthand writer, or other reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are dicta to the contrary, indeed, in certain cases in which dictation to a clerk is said to be the publication of a libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself." In the present case I do not think there was evidence on which it can be said that there was any publication of a libel.

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(1) [1907] 1 K. B. 382.

*Appeal allowed.*

Solicitors for appellants: *W. J. Pitman, for Arthur Hall-Wright & Son, Birmingham.*

Solicitors for respondent: *Chandler, Boulton & Henderson, for Talbot & Painter, Kidderminster.*

J. S. H.

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*Feb.* 10, 11.

# RALSTON *v.* RALSTON.

[1929. R. 1724.]

*Defamation—Libel—Husband and Wife—Action by Wife against Husband—Inscription on a Tombstone—Declaration that Plaintiff was lawful Wife of Defendant—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12—*Legitimacy Declaration Act,* 1858 (21 *&* 22 *Vict. c.* 93), *s.* 1.

The plaintiff married the defendant in 1893. In 1899 the parties separated under a deed of separation and thenceforward lived apart. By the deed of separation the defendant covenanted to pay an annuity to the plaintiff, and the deed also contained a covenant for further assurance. After the separation the plaintiff set up in business as a garage proprietor, and she subsequently converted this business into a private limited company in which she held the majority of the shares and also was the chairman and managing director. In 1929 she saw in a churchyard near her husband's residence a tombstone on which was the following inscription: "In loving memory of Jennie the dearly beloved wife of W. R. Crawshay Ralston of the Bungalow, Valley. Died 20th May, 1916." The defendant was the W. R. Crawshay Ralston mentioned in the inscription and he had caused the inscription to be made. The plaintiff brought an action against her husband for libel and also for a declaration that she was the lawful wife of the defendant:—

*Held*, that, though the inscription was capable of a defamatory meaning, the plaintiff, by reason of s. 12 of the Married Women's Property Act, 1882, could not sue her husband on it, the action being for a tort and not for the protection and security of her separate property.

Action tried by Macnaghten J. and a special jury at Chester Assizes.

The action was brought by the plaintiff against her husband claiming damages for libel.

The following statement of facts is taken from the judgment: The plaintiff and the defendant were married on January 12, 1893. They were in a good social position. A settlement of 25,000*l*. was made by the husband on the marriage, and he had a place at Talgarth in the county of Brecon, and it was there that the matrimonial home was established. There were two children of the marriage, the elder, William Alan Crawshay Ralston, was born on February 5, 1894, and the younger, Charles Gerard Grant Crawshay Ralston, on January 23, 1897.

After living together for six years unhappy differences arose between the parties and they agreed to separate. A deed of separation, dated March 10, 1899, was duly executed, and from that time to this they have always lived separate and apart. The plaintiff went to live at Ludlow, in Shropshire, and her husband went to Valley, in Anglesey, and they were still residing at those places when this action was brought. Under the deed of separation the defendant covenanted for himself and his executors to pay his wife, the plaintiff, an annuity of 400*l.* a year, and she was given the custody of the two children of the marriage. The deed also contained a covenant for further assurance.

The plaintiff was always interested in motoring, and after the separation she set up in business as a garage proprietor at Ludlow. After a time she converted this business into a private limited company called the "Temeside Garage, Ld." She owned the majority of the shares in that company and held the offices of chairman and managing director.

In the summer of 1929 the plaintiff was motoring with two friends of hers in Anglesey, and, in consequence of information which she received, she visited a church in the neighbourhood of her husband's residence, and in the churchyard she saw over one of the graves a tombstone on which the following words were inscribed: "In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston, of the Bungalow, Valley. Died 20th May, 1916."

The defendant was the W. R. Crawshay Ralston mentioned in the inscription, and it was admitted that he caused the inscription to be made. The meaning of the inscription is obvious—namely, that the person who was buried in that grave was, at the time of her death, the lawful wife of the defendant.

The plaintiff consulted her solicitors, who thereupon wrote on August 3, 1929, to the defendant demanding, amongst other things, that the inscription should be erased. They received a reply from the defendant's solicitors, dated August 9, refusing to make any alteration in the inscription.

Thereupon this action was commenced on August 20 claiming damages for libel and also a declaration that the plaintiff was and is the lawful wife of the defendant.

Shortly before the action came on for trial the inscription was in fact altered by removing therefrom the statement that the deceased woman was the wife of the defendant.

*Trevor Hunter K.C.* and *S. P. J. Merlin* for the plaintiff. It is clear from the decision of the Court of Appeal in *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1), that the inscription on this tombstone is capable of conveying a meaning defamatory of the plaintiff. A married woman who carries on a trade can, under s. 12 of the Married Women's Property Act, 1882, maintain an action against her husband for the protection of her own separate property, although she cannot sue her husband in respect of a tort. Brett J. in the course of the argument in *Summers* v. *City Bank* (2), when counsel arguendo propounded the question, "Could she [a married woman] sue for a libel, for instance ?" said : "If a libel on her in her trade, why not ? Would not that be an action to protect her property?" and a little later he added : "Is not the married woman suing for the protection of her trade or business, when the married woman sues for a libel which affects her credit and character as a trader ?" Therefore, a libel upon a married woman which affects her credit and character as a trader would entitle her to maintain an action against her husband, notwithstanding that a libel is a tort. In the present case the plaintiff carried on the business of a garage proprietor, and such an imputation upon her character as is conveyed by this inscription might seriously injure her in her position as a trader. The fact that she has turned her business into a private limited company, of which she is the chairman and managing director and in which she holds the majority of the shares, will not make any difference. By the deed of separation the defendant covenanted for himself and his executors to pay to the plaintiff, his wife, an annuity, and the deed also contained a covenant for further assurance.

(1) [1929] 2 K. B. 331.

(2) (1874) L. R. 9 C. P. 580, 583.

In certain circumstances the plaintiff might have to apply to the Court for a decree of specific performance of the covenant for further assurance. The plaintiff however would be unable to enforce performance of the covenant if the innuendo contained in the libel were proved to be true. A promise to pay an annuity to a woman in consideration of past cohabitation is not enforceable by action, because there was no legal consideration for the promise: *Beaumont* v. *Reeve*. (1) If, however, the promise to pay an annuity in consideration of past cohabitation is made under seal, it is made without consideration, but the deed is good as a voluntary bond: *In re Wootton Isaacson; Sanders* v. *Smiles*. (2) But a Court of equity "will never lend its assistance to enforce the specific execution of contracts which are voluntary, or where no consideration emanates from the party seeking performance, even though they may have the legal consideration of a seal; and this principle applies, whether the contract insisted on be in the form of an executory agreement, a covenant, or a settlement": Fry on Specific Performance, 6th ed., § 116; see also *Hervey* v. *Audland* (3); *In re Ellenborough. Towry Law* v. *Burne*. (4) The covenant for further assurance is a chose in action and therefore can properly be regarded as property.

*Austin Jones* for the defendant. This action is not maintainable by reason of s. 12 of the Married Women's Property Act, 1882, as a libel is a tort and by that section "no husband or wife shall be entitled to sue the other for a tort." It was held by the Court of Session in *Young* v. *Young* (5) that an action by a husband against his wife to recover damages for slander was not maintainable at law, following the decision in *Phillips* v. *Barnet* (6), which was decided upon the ground that so long as the marriage is undissolved the husband and wife are one person in law. It was held in *Reg.* v. *Lord Mayor of London* (7) that a wife could not before, and cannot since, the Married Women's Property Acts, take criminal proceedings against her husband for defamatory libel. The principles laid down by A. L. Smith J. in that case apply equally to a civil action. The statement by Brett J. during the argument in *Summers* v. *City Bank* (1), that under s. 11 of the Married Women's Property Act, 1870, a wife could sue her husband for a libel upon her in her trade, was not necessary for the decision of that case and was obiter. It was commented on by A. L. Smith J. in *Reg.* v. *Lord Mayor of London.* (2) In *Tinkley* v. *Tinkley* (3) a wife who was in domestic service sued her husband for false imprisonment and malicious prosecution alleging that she had thereby lost her situation, but it was held that the action was not maintainable as it was not brought for the protection or security of the wife's separate estate.

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(1) (1846) 8 Q. B. 483.

(2) (1904) 21 Times L. R. 89.

(3) (1845) 14 Sim. 531.

(4) [1903] 1 Ch. 697.

(5) (1903) 5 F. 330.

(6) (1876) 1 Q. B. D. 436.

(7) (1886) 16 Q. B. D. 772.

*Trevor Hunter K.C.* replied.

MACNAGHTEN J. This is an action brought by a wife against her husband claiming (inter alia) damages for libel. The question therefore arises at the outset whether, having regard to the provisions of s. 12 of the Married Women's Property Act, 1882, such an action is maintainable in law. That section, which so far as this question is concerned, is to the same effect as s. 11 of the Married Women's Property Act, 1870, provides that: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . . for the protection and security of her own separate property, as if such property belonged to her as a femme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

His Lordship, after stating the facts set out above, continued: Since the plaintiff was married to the defendant in 1893, and that marriage has never been dissolved, it is obvious that the inscription on the tombstone is capable of a defamatory meaning. That is clearly established by the recent decision of the Court of Appeal in *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1)

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(1) L. R. 9 C. P. 580, 583,
(2) (1886) 16 Q. B. D. 772.
(3) (1909) 25 Times L. R. 264.

At the close of Mr. Trevor Hunter's opening speech for the plaintiff objection was taken by Mr. Austin Jones, for the defendant, that the claim for damages for libel was not maintainable by reason of s. 12 of the Married Women's Property Act, 1882, and this is plainly the case unless it is an action "for the protection and security of her own separate property."

It was argued on behalf of the plaintiff that it was an action for the protection or security of her "property" within the meaning of the statute, because the alleged libel affected her credit and character as a trader, and reliance was placed upon an interlocutory observation of Brett J. in *Summers* v. *City Bank.* (2) That was an action in which a married woman, who carried on the business of a restaurant keeper in the City of London separately from her husband, claimed damages against the City Bank, of which she was a customer, for breach of their duty, in that the bank had failed to present a bill of exchange for payment, had failed to notify her of its dishonour on presentation, and had dishonoured cheques which she had drawn upon her account. In the course of the argument in that case Brett J. is reported to have said (2): "Is not the married woman suing for the protection of her trade or business, when the married woman sues for a libel which affects her credit and character as a trader?" Since in that case the action was an action for damages for breach of the duty arising from the relationship of banker and customer it is clear that the observation was obiter, and no decision was given by the Court with regard to that matter.

The next case brought to my attention was that of *Reg.* v. *Lord Mayor of London.* (3) In that case Mr. Vance, a comedian, had published in a newspaper a paragraph asserting that Mrs. Vance was not his wife, and she thereupon

(1) [1929] 2 K. B. 331.
(2) L. R. 9 C. P. 580, 583.
(3) 16 Q. B. D. 772.

applied for a summons against him for criminal libel. The Lord Mayor refused to grant a summons upon the ground that Mrs. Vance, being the wife of Mr. Vance, could not in the circumstances prosecute, or give evidence against, her husband, and the Divisional Court, consisting of Mathew J. and A. L. Smith J., discharged a rule calling upon the Lord Mayor to issue a summons. But in the course of his judgment A. L. Smith J. said that while it was impossible for them to hold that criminal proceedings instituted by the wife for such a libel were proceedings for the protection and security of her own separate estate, they expressly gave no opinion on the question whether an action for libel, in a case like that, could be maintained by a wife against her husband, and so far as that case is concerned the question before me remains open. Assuming, however, that the ownership of the majority of the shares in the "Temeside Garage, Ld.," is in the plaintiff, and the fact that she is chairman and managing director of that company constitutes her a trader within the dictum of Brett J., a question upon which I have considerable doubt, can it be said that the imputation made upon her by the inscription on the tombstone is an imputation which affects her credit or character in her trade? In my opinion it does not, and in coming to that conclusion I am fortified by the decision of the Court of Appeal in *Tinkley* v. *Tinkley*. (1) In that case the plaintiff Mrs. Tinkley was living apart from her husband, and had instituted divorce proceedings against him. In order to maintain herself she had entered domestic service, and whilst she was in domestic service her husband gave her into custody upon a charge of theft. She was brought before one of the Metropolitan police magistrates who dismissed the charge. Mrs. Tinkley thereupon commenced an action against her husband, not indeed for libel, but for malicious prosecution. The action came on for trial before Sutton J. who held that it was not maintainable because it could not be regarded in any sense as an action for the protection and security of her separate property.

(1) 25 Times L. R. 264.

Mrs. Tinkley appealed, and the Court of Appeal, consisting of Lord Alverstone C.J., Cozens Hardy M.R., and Buckley L.J. unanimously affirmed the decision of the learned judge. A charge of dishonesty is surely much more injurious to a domestic servant than is the imputation of unchastity to a garage proprietor. In the occupation of domestic service honesty is a necessary virtue: whereas it cannot be said that chastity is a necessary qualification for the management or ownership of a garage.

Another ground was then put forward in answer to the objection raised by the defendant that the action was not maintainable—namely, that the deed of separation contained a covenant for further assurance. This covenant, it was said, was a chose in action, and therefore might properly be regarded as "property." The inscription on the tombstone imputed that the plaintiff was not the wife of the defendant. That imputation if it were unchallenged might—so it was argued — prevent the plaintiff from enforcing the covenant for further assurance. In order therefore to protect her property it was necessary for the plaintiff to bring this action. In answer to that contention it may be pointed out that no one, from first to last, has ever raised any question whatsoever as to the fact that from 1893 down to the present time the plaintiff has always been, as she still is, the lawful wife of the defendant. And further that for the supposed purpose of assisting the plaintiff to enforce in case of need the covenant for further assurance a judgment for the defendant on the plea raised by him would be quite as effective as a judgment for the plaintiff for damages. I have therefore come to the conclusion that the action for damages cannot be maintained.

There was a further claim in the action for a declaration that the plaintiff was and is the lawful wife of the defendant at all times material thereto. As I have already said there is not and never has been any question (excepting so far as it is raised by the inscription on the tombstone) that from 1893 onwards the plaintiff has been and still is the lawful wife of the defendant. But if there were any doubt as to the

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validity of the marriage, in my opinion, an action at law in the King's Bench Division of the High Court is not the proper proceeding in which to have that matter determined. I think it would be necessary, if there were any doubt as to the validity of the marriage, to take proceedings under the Legitimacy Declaration Act, 1858, and therefore I am unable to grant the declaration for which the plaintiff asks.

*Judgment for defendant.*

Solicitors for plaintiff: *Crosse & Sons, for Clark & Co., Ludlow, Salop.*

Solicitors for defendant: *Lawrence, Graham & Co.*

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*May* 8, 9.

## GIMSON *v.* INLAND REVENUE COMMISSIONERS.

*Revenue—Income Tax—Super-tax—Assessment—Shareholder in Company—Dividend paid out of Money not subjected to Income Tax—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 5. 7.

An assessment to super-tax under the Income Tax Act, 1918, s. 7, was made upon the appellant for a certain year in respect of a dividend paid to him by a limited company in which he was a shareholder. The dividend was paid partly out of capital and partly out of money which was income in the hands of the company, but in respect of which income tax had not been payable by reason of the rules relating to the measurement of income. The revenue authorities claimed super-tax in respect of so much of the dividend as was paid out of income of the company, but in respect of which income tax had not been payable:—

*Held*, that a shareholder in a company was only liable to pay super-tax in respect of a dividend which had been subject to income tax, and that as the income of the company out of which this dividend was payable had, by reason of the application of the rules relating to the measurement of income, not been subject to income tax, the appellant was equally not liable to super-tax in respect thereof.

CASE stated under the Income Tax Act, 1918, s. 7, sub-s. 6, and s. 149 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

It was agreed between the appellant's solicitors and the solicitor of Inland Revenue on behalf of the respondents, the Commissioners of Inland Revenue, that the following supplemental statement, together with the statements, facts and contentions therein set out should be read and accepted as correct in point of fact in lieu of the statements, facts and contentions set out in the case stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 11, 1929, the appellant, Mr. David M. Gimson, appealed against an additional assessment to super-tax in the sum of 44*l.* made upon him under the provisions of the Income Tax Acts for the year ended April 5, 1928. This assessment was made in respect of a dividend received from a certain limited company (hereinafter called "the company").

The appellant was the holder of 300 ordinary shares of 5*l.* each in the company. The company made up its accounts to October 31 in every year, and its dividends were declared in respect of, and were expressed in its balance sheets to be in respect of, years ending on such date. At a general meeting of the company held on July 22, 1926, a resolution was passed to confirm the preference dividend amounting to 1847*l.* 2*s.* 6*d.*, and to confirm the payment on April 23, 1926, of a final dividend of 5 per cent. (actual) on the ordinary shares, paid out of a fund consisting of realized capital profits and other profits not liable to income tax:—

| | | | |
|---|---|---|---|
| Absorbing . . . . . | £ 40,375 | 0 | 0 |
| Preference dividend . . . . | 1847 | 2 | 6 |
| To carry forward . . . . | 447,367 | 15 | 5½ |
| | £489,589 | 17 | 11½ |

This dividend of 40,375*l.* was paid out of the amount of 489,589*l.* 17*s.* 11½*d.* standing to the credit of profit and loss account in the balance sheet of the company for the year ended October 31, 1926, and appeared in the balance sheet for that year as payable in respect of the year 1924/25 and as diminishing the said balance of 489,589*l.* 17*s.* 11½*d.*

The fund referred in the said resolution forming part of the balance of 489,589*l.* 17*s.* 11½*d.* amounted to 63,051*l.* 11*s.* 9*d.* For the purposes of the case stated and this statement the

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said dividend had been treated as paid out of the said fund of 63,051*l.* 11*s.* 9*d.*, which was made up of the following items :—

| | | | | | | |
|---|---|---|---|---|---|---|
| (1.) Profit on realization of investments . | £16,596 | 1 | 0 | | | |
| Less loss on investments . . | 10,673 | 9 | 3 | £ 5922 | 11 | 9 |
| (2.) Profit on sale of machines ex plant | | | | 20,724 | 0 | 0 |
| (3.) War Loan Interest, Treasury Bill Discount, etc. . . . . | | | | 21,146 | 0 | 0 |
| (4.) Foreign and Colonial Dividends . | | | | 8684 | 0 | 0 |
| (5.) Profit on exchange . . . | | | | 4050 | 0 | 0 |
| (6.) Premiums on issue of shares . . | | | | 2525 | 0 | 0 |
| | | | | £63,051 | 11 | 9 |

It was conceded by the Crown for the purposes of the case stated and this statement that so much of the dividend as was paid out of items (1.), (2.), (5.) and (6.), which were treated for the purposes of this case as being of a capital nature and not assessable to income tax in the company's hands, was not liable to super-tax, but it was claimed that so much of the dividend as was paid out of items (3.) and (4.) was liable to super-tax.

The liability was accordingly computed on $\frac{21,146 + 8684}{63,051}$ of the dividend of 75*l.*—namely, 35*l.* received by the appellant. The assessment under appeal was arrived at as follows :—

| | |
|---|---|
| Actual amount of dividend liable to super-tax | £35 |
| Appropriate addition for income tax . . | 9 |
| Assessment . | £44 |

Item (3.) of the fund consisted of :—

| | |
|---|---|
| Treasury Bill discounts . . . . | £8726 |
| Interest on Munition Levy paid in advance . | 5718 |
| Interest on 5% War Loan . . . . | 6702 |
| | £21,146 |

The Treasury Bill discounts and Interest on Munition Levy were each received in one year only many years before the year when the dividend in question was declared. These particular amounts had not been brought into computation for assessment in the respective years of receipt, because under the Rules of Case III. of Sch. D which were in force at that time the basis of assessment was the amount of the preceding year's income, which was nil. Neither had these particular amounts been brought into computation for assessment in the following year, because the company had no income from these sources in those years, and under the decision in *Brown* v. *National Provident Institution* (1) no assessment could be made for those years.

The War Loan Interest of 6702*l.* was the amount received without deduction of tax in the year 1921–22. As no income from this source had been received in the following year 1922–23 this amount of 6702*l.* of War Loan Interest had not been included in any computation for assessment to income tax for 1922–23 or any other year, but there had been an assessment under Case III. for 1921–22 in respect of the War Loan Interest based on the amount received in the previous year.

Item (4.) consisted of portions of dividends on certain foreign and colonial shares received by the company in the years 1921–22, 1922–23 and 1923–24. Dividends of this description were assessable under the Rules of Case V. of Sch. D then in force on the average of the three preceding years, and a dividend arising in any year was accordingly brought into the computation of the income for assessment in each of the three succeeding years to the extent of one-third in each year if any assessment was competent in such succeeding years. The company had no income from those sources in the two years 1924–25 and 1925–26, and consequently under the decision in *Whelan* v. *Henning* (2) no assessments were or could be made for those years in respect of profits from those sources. The portions of the dividends which arose in the years 1921–22, 1922–23 and

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(1) [1921] 2 A. C. 222.

(2) [1926] A. C. 293.

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1923–24, which formed any part of the basis of the computation for assessment under Case V. in succeeding years, appear from the following statement:—

| | Brought into computation. | | Not brought into Computation. | | Brought into computation. |
|---|---|---|---|---|---|
| Dividends for | 1922–23. | 1923–24. | 1924–25. | 1925–26. | 1926–27. |
| | £ | £ | £ | £ | £ |
| Dividends for 1921–22, £5184 .. | 1728 | 1728 | 1728 | — | — |
| Dividends for 1922–23, £5130 .. | — | 1710 | 1710 | 1710 | — |
| Dividends for 1923–24, £5305 .. | — | — | 1768 | 1768 | 1769 |
| | | | 5206 | 3478 | |
| | | | £8684 | | |

There had been assessments under Case V. for 1921–22, 1922–23 and 1923–24 in respect of dividends from foreign and colonial shares based on the average of the three preceding years.

It was contended by the appellant that as the items of income (3.) and (4.) were not liable to be assessed to income tax, any dividend paid thereout was not liable to assessment to super-tax, and that the assessment should accordingly be discharged.

It was contended on behalf of the Commissioners of Inland Revenue (inter alia):—

(*a*) That the amounts in items (3.) and (4.) above mentioned had been taxable and taxed in the hands of the company in the years in which they were respectively received on the statutory basis as laid down in the Income Tax Acts.

(*b*) That the use of the figures in items (3.) and (4.) as the measure or basis of computation for subsequent years was irrelevant.

(*c*) That in so far as the dividend of April 23, 1926, was paid out of items (3.) and (4.) it attracted super-tax in the hands of the appellant.

(*d*) That the assessment as made should be confirmed.

The Commissioners held that a dividend paid out of income assessable to income tax was liable to super-tax, notwithstanding that income tax might not have been paid on the actual amount of income by reason of the assessment to income tax being based on some other measure than that of actual income. They accordingly confirmed the assessment.

The appellant immediately after the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law, and in due course required the Commissioners to state a case for the opinion of the High Court.

*Raymond Needham K.C.* and *Scrimgeour* for the appellant.

*Sir William Jowitt A.-G.* and *R. P. Hills* for the respondents.

ROWLATT J. This is an important point which may not often arise in practice, but which is of a very fundamental character and of great importance. The point is this. The appellant is a shareholder in a company and received a dividend. The company in that year made no taxable profits, and the dividend was paid partly out of capital and partly out of income which, by reason of the Rules relating to the measurement of income for the purposes of income tax was for tax purposes nil, although the money was there. The appellant was paid a dividend in all of 75*l.*, and nothing was deducted for income tax, nor was it said to be free of income tax. In fact the 75*l.* was the appellant's aliquot proportion of what the directors of the company were disposing of, including income tax, which, of course, was nil. In those circumstances the dividend has for super-tax purposes been split up, and it is said that as regards 40*l.* out of the 75*l.* that represents capital, and can accordingly be disregarded, but that as regards the remaining 35*l.* that is income, which is liable to super-tax. The Attorney-General says, as I think he is entitled to say, that he does not accept the propriety of splitting up the dividend and seeing what it comes from, and he reserved that point.

But as this case is presented to me I have to deal with a sum of money which is taken out of the dividend, and is looked at by itself upon the footing that it arises out of the division of a sum of money which is income in the hands of the company, but in respect of which income tax has, owing to the principles of measurement, not been paid and is not payable. Now what has been done in this case in assessing the appellant to super-tax is this: the 35*l.* received by the appellant in respect of this part of his dividend, which was the appellant's aliquot proportion of what the company had earned from this source or of what they had to divide from this source, was treated as increased by a sum of 9*l.*, which the Commissioners call the appropriate addition for income tax, that is to say, that the 35*l.* really represents 44*l.* of profits divided by the company on which 9*l.* has been deducted for income tax. That is simply stating what is not the fact. There is no evidence to support that. It is a simple statement as to something which is a disputable fact, and the Attorney-General really did not contend to the contrary. What he did contend was, that although the assessment of 44*l.* could not be maintained, nevertheless the assessment could be maintained if the figure was 35*l.*, and he said that although income tax had not been charged upon 35*l.*, he would maintain his right to say that it ought to have been charged, either that it ought to have been charged in the hands of the recipient by direct assessment, or that it ought to have been treated as tax bearing income paid by the company out of funds not themselves taxed, so that the company ought to have deducted the tax and ought to have paid it over, and that as they had not done so they were liable to a penalty under s. 33 of the Finance Act, 1924.

That brings me to the point in the case, which is this. The Commissioners have held that the dividend received from a company is itself a tax bearing subject-matter, and that it

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is not a subject-matter which represents merely the division to the individual of a fund which has suffered tax so that the tax attaches in the hands of the company, and that the receiver of the dividend has nothing whatever to say to the income tax as regards that. The matter became of extreme importance in the first instance in cases where a subject having a small income was entitled to recover back tax. The rule which governs the method of estimating the income in such a case is exactly the same rule as that which governs the method of estimating income for the purposes of super-tax, and if the Commissioners are right in this case in assessing the appellant to super-tax in the sum of 44*l.*, we should arrive at this extraordinary result, that if the income of the appellant was a small one he could recover back income tax which the revenue authorities had never received, and which represented sums which did not exist, which would be quite wrong.

I have always regarded it as fundamental that an individual whose income comes to him straight and is small recovers the tax which he has suffered and no other, and that an individual who pays super-tax pays it in respect of a fund which has suffered tax, and no other, so if the appellant had received this money not from the company but direct, by himself holding the source of income from which it was derived, and had not been liable to income tax in respect of that sum of money by reason of the rules relating to the measurement of income for the purposes of income tax, his income would not be a subject-matter on which he could recover back tax in case his income was small or on which he would pay super-tax in case his income was a large one. The case of a company is somewhat different, but in essence it is the same, and the Attorney-General very properly referred to what I said in *Inland Revenue Commissioners* v. *Blott* (1), which is a material case. A shareholder can only recover back tax which the money he received has suffered, and he can only be liable to pay super-tax in respect of a dividend which is taxable. The Attorney-General

(1) [1920] 1 K. B. 114.

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says that although that may be so, still when a person receives a dividend which somehow or other comes to him from a fund which is not taxed, then it becomes, under rule 21 of the All Schedules Rules, "an annual payment charged with tax under Schedule D," and it is charged under Sch. D, by reference to Case VI., which is a sweeping in case. All I can say to that contention is that it is a theory which I think must be established by some Court superior to this Court. It is absolutely contrary to the idea one has always held, and it is in my experience entirely novel. I think the appellant is entitled to succeed in this case, and the appeal must therefore be allowed.

*Appeal allowed.*

Solicitors for appellant: *Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

Solicitor for Crown. *Solicitor of Inland Revenue.*

R. F. S.

## BIRCH BROTHERS, LIMITED *v.* BROWN.

C. A.

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*May* 21, 22; *June* 4.

*Workmen's Compensation — Review of Compensation — Loss of left Eye by Accident — Incipient Cataract in right Eye — Supervening Blindness in right Eye — Inability to obtain Work — Offer of Work by Employers' Insurance Company — Refusal of Offer owing to Inability — Whether Inability due to Accident — Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9.

A workman, whose right eye was affected by incipient cataract, lost his left eye by an accident arising out of and in the course of his employment. In respect of this injury he obtained an award of compensation, first of a sum for partial incapacity, and afterwards, on his application for review, in consequence of his inability to get work owing to his obvious disfigurement, a weekly sum for total incapacity. While this weekly sum was being paid the employers' insurance company offered employment to the workman as a cleaner in their office, but as the company refused to give him an escort home from the work he refused to accept the offer. Thereupon the employers applied for a review, and on the hearing of that application the county court judge found that the workman was unfit for any work; that the condition of his right eye, which was responsible for his unfitness for work, was not due in any way to the accident, and that the offer of work by the insurance company, which the judge found to be a genuine offer, removed the operation of *Ball* v. *William Hunt & Sons, Ld.* [1912] A. C. 496. He accordingly reduced the compensation to half the difference between the workman's pre-accident wages and the wages offered to him by the insurance company.

The workman appealed:—

*Held* (Scrutton L.J. dissenting), that the county court judge was wrong in reducing the compensation, because,

Per Greer L.J.: The inability of the workman to accept the insurance company's offer of work and his inability to do any work was the result of the accident.

Per Slesser L.J.: The work offered was not suitable work for the workman in view of his condition at the date of the offer.

*Hargreave* v. *Haughhead Coal Co.* [1912] A. C. 319 and *Lomax* v. *Sutton Heath and Lea Green Collieries* (1926) 19 B. W. C. C. 301 considered.

APPEAL from Bloomsbury County Court.

Brown who was a workman in the employment of Birch Brothers, omnibus proprietors, as a driver and wheelwright, met with an accident to his left eye arising out of and in the course of his employment on December 1, 1926, and as a consequence the eye had to be removed. He returned to his employment on February 7, 1927, but being then unable to drive, he worked as a wheelwright till October, 1927, when he was discharged. Thereupon he applied for compensation under the Workmen's Compensation Act, 1925, and an award of 3*s*. 4*d*. per week from March 19 to October 1, 1927, in respect of partial incapacity was made in his favour, with a declaration of liability. Being obviously a one-eyed man he could not get work. He then applied for a review, and on June 14, 1929, he obtained on that application an award of 1*l*. 10*s*. per week for total incapacity, commencing on October 2, 1927. At the date of the accident cataract had begun to show itself in the right eye, and a medical witness stated that this would progress rapidly, leading to a state when the workman would be totally unfit for work. On January 25, 1930, the employers' insurance company wrote to the workman offering him employment as an assistant cleaner in their offices at 3*l*. per week. The workman was willing to accept this offer if he could be given an escort home from his work, but as this was refused the workman declined the offer. Thereupon on February 17, 1930, the employers applied for a review of the award of 1*l*. 10*s*. on the ground that the workman's condition and capacity for work entitled them to terminate or diminish the compensation. On that application, which was heard on March 25, 1930, the county court judge found that the workman was unfit for work, that the condition of the right eye, which was now responsible for his inability to work, was due not to the accident but to cataract, that the offer of employment by the insurance company was a genuine offer, and that as that offer had been refused the compensation must be reduced to 1*s*. 8*d*. per week, being half the difference between the pre-accident wages and the wages offered by the insurance company.

The workman appealed.

*Edgar Dale* for the appellant. The county court judge was wrong in holding that the appellant's inability to work was not due to the accident. The incapacity resulted from the accident. There are three classes of eye cases. First, where the workman is blind in one eye before the accident to his good eye; in this case complete blindness is the result of the accident. Secondly, where the workman has two good eyes at the time when an accident deprives him of the sight of one of them, but he is able to return to work and earn full wages, and subsequently something occurs—novus actus interveniens—which blinds his remaining eye. That was the position in *Hargreave* v. *Haughhead Coal Co.* (1), where it was said that the loss of sight of the second eye did not result from the original accident, but resulted from the new act. Thirdly, where the workman, having at the time of the accident one good eye and the other affected by cataract, which is certain before very long to deprive him of sight in that eye, loses by accident the sight of his good eye. That is the position in the present case. But for the accident the appellant would have been able with his left eye to continue work, but that eye being destroyed by the accident, he became wholly incapacitated for work as the result of the accident.

*Cave K.C.* and *Paull* for the respondents. The county court judge was right in holding that the appellant's incapacity was not due to the accident. On almost precisely the same facts the House of Lords held in *Hargreave's* case (1) that the incapacity was not due to the accident but was due to cataract in the uninjured eye. That case, which was followed in *Lomax* v. *Sutton Heath and Lea Green Collieries* (2), is directly in point and governs this.

[SCRUTTON L.J. referred to *Stowell* v. *Ellerman Lines.* (3)]

In that case the workman was to some extent incapacitated by the original injury, and therefore that injury, as well as the disease, caused the disability. He was therefore held entitled to some compensation for the incapacity which resulted from the injury. In this case the inability to accept the offer of work was not due to the accident but was wholly due to the cataract.

*Dale* replied.

*Cur. adv. vult.*

(1) [1912] A. C. 319.
(2) 19 B. W. C. C. 301.
(3) (1923) 16 B. W. C. C. 46.

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BIRCH BROTHERS, LD. v. BROWN.

June 4. The following judgments were read:—

SCRUTTON L.J. This appeal from Judge Hill Kelly at the Bloomsbury County Court raises a question which, in view of the existing authorities, I find difficult to answer.

The workman and appellant, Brown, was in the employment of the respondents, omnibus proprietors, as a driver and wheelwright. He suffered on December 1, 1926, an injury by accident to his left eye, which had to be removed in consequence. This eye had previously suffered from cataract, and was, before the accident, of very little use. However, the accident led to its removal, and he became an obviously one-eyed man. He went back to his employers on February 7, but was unable to drive. He worked as a wheelwright till October 1, 1927, when he was discharged. For this period he obtained in January, 1928, an award of 3*s.* 4*d.* a week for partial incapacity, with a declaration of liability. Being obviously a one-eyed man, he could not get work. In an application for review, he obtained, on June 14, 1929, an award of 30*s.* a week for total incapacity commencing on October 2, 1927. This was based on the principle of *Ball* v. *William Hunt & Sons* (1), "inability to get work" caused by the obvious disfigurement occasioned by the accident. It was found he was physically fit to work, seeing with his right (non-accident) eye. But at that time cataract had begun to encroach on the right eye, though the workman could do the work of a wheelwright.

On October 14, 1929, Dr. Summers made a further report that the right eye was a little more defective, though the workman was then "fit to carry on his ordinary occupation," but Dr. Summers was of opinion that the cataract in that eye would progress rapidly, leading to a state when the workman would, in a few months, be totally unfit for work; and the result of an operation would be very uncertain. No further examination of the right eye was made between October 4, 1929, and March, 1930. But on January 25, 1930, the insurance company of the employers wrote to the workman offering him employment as an assistant cleaner of their new offices at 3*l*. a week. If this was accepted, they would get his services for 30*s*. beyond the 30*s*. they were liable to pay as compensation. If this was refused, they might be able to review an order based on *Ball* v. *William Hunt & Sons* (1), as his one-eyed appearance had not stopped an employer from offering suitable employment. It does not appear that the insurance company knew the exact condition of his eyesight at that time. Diplomatic and tactical letters passed on either side, and the workman was apparently willing to try the work if he could be given an escort home from his work. This was refused, and on February, 17, 1930, the employers applied for review of the 30*s*. award of June, 1929, on the ground that the workman's condition and capacity for work entitled the employers to termination or diminution of the compensation. The application came before the Court on March 25, when the judge found that the workman was now unfit for any work; that the condition of the left (accident) eye was the same as in June; that the condition of the right (non-accident) eye, which was now responsible for his unfitness for his work, was not due in any way to the accident; that the offer of employment by the insurance company, which was a "genuine one," removed the operation of *Ball* v. *William Hunt & Sons* (1); and that the present unfitness to work was not the result of the accident, but of the cataract in the other eye. He therefore reduced the compensation to 1*s*. 8*d*., being half the difference between the pre-accident wages and the wages offered by the insurance company. He thus eliminated entirely the unfitness caused by the cataract in the right eye, and its effects on the fitness to do any work at all. The finding that the offer was "genuine" cannot be interfered with, and is probably right. The company meant to pay 3*l*. a week if the workman could do the work; they did in fact pay it to another compensation man who could do the work; and in their view if the workman could not do the work because of a cataract that did not result from the accident; they could disregard that; it was not their affair.

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(1) [1912] A. C. 496.

(1) [1912] A. C. 496.

Against this decision the workman appeals. If there were no authorities, I think the Court could see its way clearly. A man with two eyes has each eye as a stand-by to the other; if he loses either, his condition is materially impaired, for he is deprived of a stand-by eye. It does not seem to me to make much difference whether he first loses an eye by disease, and then loses the other eye by accident within the Act, in which case I understand it is agreed he would recover compensation for total incapacity; or whether he first loses an eye by accident, and then loses the other by unconnected disease. In the second case, I should have thought, the effect of the accident is that he becomes totally blind, whereas if there had been no accident but only disease, he would be able to see. In other words, the resultant blindness is caused by two combined causes, neither of which would produce it alone, the disease in one eye and the accident to the other.

But the authorities put difficulties in the way of giving effect to this view. In *Hargreave* v. *Haughhead Coal Co.* (1) a workman in February, 1910, sustained an accident to his right eye, which had to be removed; he was then a one-eyed man. At that time his left eye was sound. In December, 1910, he resumed his work as a miner, but there were signs of incipient cataract in his left eye, which would gradually cause incapacity for work. The House of Lords affirmed an order relieving the employers from liability to pay compensation after September, 1910, when he was able to work, and declined to grant a declaration of liability on the ground that future incapacity would be caused by the disease which had nothing to do with the accident. The House paid no attention to the fact that the man by the accident was a one-eyed man, a fact which, two months later, in *Ball* v. *William Hunt & Sons* (2), they held to justify a finding of total incapacity, if through it, though able to work, he was unable to get work. They also disregarded the fact that the accident reduced him to a condition in which the loss of the other eye would blind him, a consequence which would not have followed before the accident.

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(1) [1912] A. C. 319.

(2) [1912] A. C. 496.

They must have held that the accident was not in any way responsible if total blindness followed. In *Lomax* v. *Sutton Heath and Lea Green Collieries* (1) this Court reluctantly felt bound to follow *Hargreave's* case. (2) In *Lomax's* case (1) a workman lost his right eye by accident in 1915, but as, owing to rise of wages, he made more in an inferior employment than he did before the accident, he received no compensation. He then, in 1925, lost the sight of his other eye from disease not connected with the accident. The county court judge was prepared to give him an award of half the difference between the post-accident collier's wage and the post-accident dataller's wage (the work he was in fact doing before he lost the sight of the second eye). This Court felt itself bound by *Hargreave's* case (2) to set the award aside and refuse a declaration of liability, the loss of the second eye having nothing to do with the accident.

It is true that the House of Lords in *King* v. *Port of London Authority* (3), reversing the Court of Appeal, granted a declaration of liability to a man who had an accident to an eye already practically blind, but was able to continue work at higher wages, a decision which is difficult to reconcile with *Hargreave's* case (2), which was cited to the House, but not referred to in the judgments. It was granted on the ground that there was reasonable probability of further incapacity, and the eye had not been extracted. There are also the class of decisions of which *Harwood* v. *Wyken Colliery Co.* (4) is an example, where a workman is disabled from working both by accident and by heart disease. I have summarized these cases in *Lewis* v. *Guest, Keen & Nettlefolds.* (5) The difference is that in these cases each of two causes would produce the whole result, whereas in the eye cases, it takes the two causes to produce the whole result; neither by itself would produce the whole result. In *Stowell* v. *Ellerman Lines* (6) Lord Sterndale considered the case of a workman partially incapacitated by an accident, but also totally and independently incapacitated by a disease, and the Court came to the conclusion that the judge was wrong in refusing all compensation because of the independent disease, but must assess the extent of partial incapacity due to the accident. If this is applied to the present case, the judge is to disregard the incapacity due to the blindness of the non-accident eye and to consider the incapacity due to the accident. This was, till the insurance company offered work, only the incapacity of a one-eyed man in appearance who could not get work; this would be removed by the offer of work. The man cannot do the work offered because of the joint effect of the accident and disease. If in *Stowell's* case (1) one may disregard the total incapacity by disease, may one disregard here the total incapacity by disease ? Here the disease alone does not create total incapacity; it is the disease plus the accident. In *Stowell's* case (1) the disease alone caused total incapacity, yet the workman was held entitled to recover for the partial incapacity by accident. If, following *Stowell's* case (1), the judge is asked to assess the partial incapacity caused by accident he is apparently to assume that there is no disease. But if in the present case one assumes no disease, the workman can do the work he is offered, and the judge's award is correct.

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(1) 19 B. W. C. C. 301.
(2) [1912] A. C. 319.
(3) [1920] A. C. 1.
(4) [1913] 2 K. B. 158.
(5) [1928] 1 K. B. 20.
(6) 16 B. W. C. C. 46.

I have found the question, owing to the authorities, one of extreme difficulty, but I have reluctantly come to the conclusion, either on the complicated argument derived from *Stowell's* case (1) or on the binding authority of *Hargreave's* case (2) and *Lomax's* case (3), that we cannot interfere with the judgment of the county court judge. In *Lomax's* case (3) both *King's* case (4) and the line of cases following *Harwood's* case (5) were considered and held not to affect the result. But, as in *Lomax's* case (3), I repeat I cannot consider the result satisfactory; but only the House of Lords or legislation can, in my opinion, deal with it. In my view the appeal must be dismissed with costs.

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(1) 16 B. W. C. C. 46.
(2) [1912] A. C. 319.
(3) 19 B. W. C. C. 301.
(4) [1920] A. C. 1.
(5) [1913] 2 K. B. 158.

GREER L.J. This is an appeal from an award made by the judge of the Bloomsbury County Court on an application for review made by the employers whereby he reduced the compensation of 30*s*. per week which he had awarded the appellant on June 14, 1929, to the sum of 1*s*. 8*d*. per week. The facts, on which the decision in this case turns, are not so definitely stated by the learned judge as to leave his findings entirely free from doubt, but I have come to the conclusion that it is right to treat the following facts as having been found as the basis of his award.

For many years before December 1, 1926, the appellant had been employed by the respondents, who are omnibus proprietors and mail contractors, as a wheelwright and van driver. For his work as a wheelwright he received 2*l*. 16*s*. 6*d*. per week; for his work as a driver he received 6*s*. 8*d*. per week. On December 1, 1926, he met with an accident arising out of, and in the course of, his employment, which so damaged his left eye that it had to be removed by operation on January 20, 1927. He provided himself with a glass eye which was very uncomfortable and which he sometimes did, and sometimes did not, wear.

At the time he met with his accident his left eye had been affected by cataract, but the cataract had been removed. After the operation he had some sight in that eye, but it was far from perfect. The judge has not found to what extent the left eye was defective immediately before the accident. It was not disputed by the respondents that at the date of the accident the right eye was affected by cataract. Mr. Summers, F.R.C.S., a witness for the respondents, who examined him on the occasion of the accident in December, 1926, stated in his evidence that in December, 1926, vision in the right eye was less than 6–60ths without a glass, 6–36ths with a glass, and that there was then commencing cataract. He found in 1929 that the right eye was slightly more defective; that cataract was beginning to advance; and that cataract began to encroach on his vision before June, 1929; that by March, 1930, the condition had considerably advanced; and that at the date of the hearing when the learned judge made the award which is the subject of this appeal, the appellant's sight was so defective that he was unable to do any work.

The appellant returned to his work in February, 1927, and for a short time did driving work as well as wheelwright's work. It was soon found that it was unsafe for him to go on driving, and his total wages were reduced by 6*s.* 8*d.* On October 1, 1927, he left the service of the respondents for reasons unconnected with the accident. Thereafter he took proceedings for compensation in the Bloomsbury County Court, and on January 9, 1928, he was awarded 3*s.* 4*d.* per week from March 19 to October 1, 1927, and a declaration of liability, presumably to keep the question of compensation as from October 1, 1927, open in case the appellant should be able to prove that he was partially or totally incapacitated as from that date by reason of his inability through the loss of his left eye either to obtain any work at all or to earn as much wages as before the accident.

In 1929, the appellant again applied in the county court for an award, and on proof of unavailing efforts to obtain employment, he obtained, on June 14, 1929, an award for the payment of 1*l.* 10*s.* per week as compensation to commence from October 2, 1927, and to continue until diminished, increased, or redeemed in accordance with the Workmen's Compensation Act.

On February 17, 1930, the respondents applied to the county court to review the compensation either by way of termination or diminution of the weekly payment. At the hearing it was proved to the satisfaction of the judge that on January 25, 1930, the respondents' insurance company offered the appellant employment as an office cleaner at 3*l.* per week, and the learned judge held that this was a bona fide offer and that all he had to consider was whether his inability to accept the offer and do the work was the result of the accident. He thus states his finding: "In these circumstances I considered that the employers were entitled to ask for a review of the weekly payment ordered in June, 1929, and to have the weekly payment based on the difference between the average weekly earnings of the injured workman before the accident, that is 3*l*. 3*s*. 4*d*. and the amount which, so far as the effects of the accident were concerned, he could earn in the suitable employment offered to him by the Midland Assurance Company, that is 3*l*. a week, and I accordingly ordered that the weekly payments be diminished to 1*s*. 8*d*., one-half of the difference. I held that, in such a case, the amount which an injured workman is able to earn is the amount which an employer is bona fide willing to pay him for his labour."

Though the judgment of the county court judge does not contain any express finding that the appellant's condition at the date of the offer was the same as at the date of the hearing, I think that such a finding is clearly implied in the first part of the supplemental note, where he states that he found as a fact that the very grave change for the worse since June, 1929, of the right eye of the injured workman had rendered him unfit for any employment. By this I am of opinion that he meant that the appellant was unfit to do the work that was offered to him at the time the offer was made.

It seems to me therefore that we must deal with this case as one in which we have to consider the right to compensation of a man who has been by accident deprived of his one eye at a time when his other eye was diseased and likely to become useless.

On the application for review the employers had to show that the appellant's incapacity for work—namely, his inability to earn wages which had been found to exist in June, 1929, as a result of the accident—had wholly ceased, or that his capacity for work or ability to earn had improved. They argued, and the judge has found, that by reason of the offer made to him, his earning capacity, so far as the effects of the accident were concerned, had improved to the amount of 3*l*. per week.

The basis of the learned judge's award was that in his judgment the appellant's inability to accept the situation offered and thereby earn 3*l*. per week was not the result of the accident. In my judgment, the learned judge was wrong in so finding.

Before dealing with the authorities bearing on the question I propose to consider it on general principles. If the appellant's right eye had been sightless at the time of the accident, it seems clear that he would have been entitled to compensation on the basis applicable to a totally blind man. The employers could not say to him: "If your right eye had been a good eye you would not have been a blind man; your blindness, therefore, is not a result of the accident." Similarly, if a workman with heart disease is killed by an accident which would not have killed a man with a normally healthy heart, the employers could not resist the widow's claim for compensation by saying to her, "Your husband's death is not the result of the accident, because if he had not had heart disease the accident would not have resulted in his death." It seems to me that the position would be the same whether the accident affecting a man with heart disease resulted in his death immediately or at some later period which might be weeks, months or even years after the accident. The question for the arbitrator would always be: Did the death result from the accident occurring to a man with a diseased heart? The question would, in my judgment, be no different in any case in which an accident happens to an already partly disabled man. If the result of the accident to a disabled man is, from the date of the accident, to make him unemployable, he would be entitled to recover on the basis of total disablement. The same consequences would follow if the disablement did not immediately result, but arose at a later date. In the present case the appellant lost his left eye by accident at a time when his right eye was suffering from a progressive disease, which, in all probability, would bring about at some later period a condition of blindness in that eye which might, or might not, be curable by operation. If curable his earning capacity would be interfered with for a time only. If incurable it would be permanently affected. I should therefore hold, in the present case, unless precluded by binding authority, that

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the appellant's inability, due to his blindness, to accept the situation offered him was the result of the accident within the meaning of s. 9 of the Workmen's Compensation Act, 1925.

But it is said that there are decisions of this Court and of the House of Lords which make it impossible for the Court so to hold. It has been held in a number of cases that where the effects of the accident are such as, by themselves, render the workman incapable of earning wages, the fact that some other event since the date of the accident has also the effect of preventing him from earning, does not preclude him from recovering compensation: see *Harwood* v. *Wyken Colliery Co.* (1); *Stowell* v. *Ellerman Lines* (2); and *Lewis* v. *Wrexham and Acton Collieries* (3); and there are Scottish decisions to the same effect. *Harwood* v. *Wyken Colliery Co.* (1) is a typical case of this kind. In that case a miner had had an accident to his knee in October, 1911, and in April, 1912, his doctor first noticed that he suffered from heart disease. The county court judge found that the miner was incapacitated from work by both causes, each independent of the other, and on these facts dismissed his claim for compensation. He appealed, and the Court of Appeal allowed the appeal. Hamilton L.J., in giving judgment, said (4): "In my opinion the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart."

In *Stowell* v. *Ellerman Lines* (2) a workman who was partially incapacitated subsequently became totally incapacitated by a disease in no way connected with the accident. The learned county court judge held that he was not entitled to compensation. The Court of Appeal reversed this finding and found that he was so entitled. The law established by these cases does not seem to me to help very much in the present appeal. They are cases which deal with the question of liability to pay compensation when the facts proved show that incapacity would exist if there had been no supervening cause, and would also exist if there had been no accident. They establish that in such cases the workman is not disentitled to compensation.

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(1) [1913] 2 K. B. 158.

(2) 16 B. W. C. C. 46.

(3) (1916) 9 B. W. C. C. 518.

(4) [1913] 2 K. B. 169.

But the cases of *Hargreave* v. *Haughhead Coal Co.* (1) and *Lomax* v. *Sutton Heath and Lea Green Collieries* (2) raise rather more serious difficulties in the way of the appellant's success. In the first case the facts were that a miner, who had lost an eye by accident and had received full compensation, recovered, and was able to earn full wages notwithstanding the fact that he had only one eye. At the date of the application he was suffering from incipient cataract in the other eye. There was no evidence that he had the incipient cataract at the date of the accident. He had recovered from the effects of the accident and, notwithstanding his incipient cataract, was in a fit condition to work as a miner. It was argued on his behalf that he was entitled to a declaration of liability, because the incipient cataract would eventually affect his uninjured eye with blindness and he would then be able to say that his blindness was the result of the accident. The House of Lords held that he was not entitled to the order asked for. Lord Macnaghten, in giving judgment, said: "At the time of the accident there was no sign of incipient cataract," and he did not say what his view would have been if the man had had cataract at the time of the accident. Lord Atkinson points out that the cataract did not exist at the time of the accident, but developed subsequently. But there are words in his judgment which seem to indicate that, in his opinion, if the cataract was in an incipient stage at the time of the injury, the workman would only be entitled to the order asked for if the injury accelerated the disease. Lord Shaw undoubtedly said that the finding that the cataract in the left eye was not due to the accident was conclusive against the claim. But this observation falls to be interpreted as applying to the facts of the particular case, which related to a disease that affected the man as a supervening cause and was not in existence at the date of the accident. The opinion expressed by Lord Atkinson is, of course, entitled to great weight, but I think it was obiter, and the case can only be treated as an authority that where the incapacity arises from a disease which attacks the workman subsequently to, and independently of, his injuries by accident, he is not entitled to compensation.

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(1) [1912] A. C. 319.

(2) 19 B. W. C. C. 301.

The case of *Lomax* v. *Sutton Heath and Lea Green Collieries* (1) carries the matter no further, because in that case the disease did not affect the workman until many years after the accident.

These decisions do not oblige this Court to hold that where injury by accident caused to a workman suffering from a progressive disease is followed after an interval of time by inability to earn, which would not have occurred if the accident had not happened, such inability to earn is not the result of the accident. In my judgment, for the reasons stated before I considered the decided cases, the appellant's inability to accept the insurance company's offer, his inability to do any work as found by the learned judge, was the result of the accident. The appeal should be allowed and the case remitted to the county court to make an award dismissing the respondents' application to review, and that the appellant should have his costs here and below. A suggestion was made by Slesser L.J. during the argument that the appeal ought to be allowed, because the work offered was not suitable for the appellant in the condition in which he was at the date of the offer, and that the Court was not entitled to consider what the cause of that condition was. I do not think the appeal can succeed on this ground by itself. It seems to me, with respect, that if I am wrong in holding that the appellant's inability to earn was the result of the accident, it would be wrong to hold that the employment offered was not suitable within the meaning of the Act. I think "suitable" means suitable for the workman so far as his condition resulting from the accident is concerned. The effect of holding otherwise would be that once an order for compensation was made, it could never be reviewed if some supervening cause made the workman unfit for any work, though it could be

(1) 19 B. W. C. C. 301.

proved that there was plenty of work available for him if he was suffering only from the results of the accident. This would have the result of making the employer liable for the consequences of a later accident which did not arise out of or in the course of the employment.

SLESSER L.J. This is an appeal from an award of His Honour Judge Kelly, whereby he assented to an application for a review of a weekly payment of 1*l.* 10*s.* per week on a basis of total incapacity to the workman to be reduced to 1*s.* 8*d.* per week, being half the difference between the sum of 3*l.* 3*s.* 4*d.* which the workman was earning before the accident and 3*l.* per week which he finds the workman is now able to earn in a suitable employment, which has been offered to the workman. The accident, which happened on December 1, 1926, resulted in the loss of the applicant's left eye, and, on June 14, 1929, an award was made in favour of the workman of 1*l.* 10*s.* per week on a basis of total incapacity. The learned judge, in making this award, stated that the applicant was, at the date of that hearing, June 14, 1929, physically able to do his late work of a wheelwright, but by reason of the extraction of his left eye as a consequence of the accident on December 1, 1926, he was manifestly a one-eyed man, and, on that account, he was unable to get work. In these circumstances he held, on the authority of *Ball* v. *William Hunt & Sons* (1), that he was entitled to claim compensation, and awarded him 1*l.* 10*s.* per week from October 2, 1927, the date immediately after he was discharged by the respondents. I read this to mean that the learned judge held that on June 14, 1929, in the words of Lord Loreburn L.C. in *Ball's* case (2), the workman had a physical defect which made his labour unsaleable in any market reasonably accessible to him.

In order that the respondents may succeed on a review, it is necessary that they should show a change of circumstance. It is not suggested that any physical change has occurred since June, 1929, except that the right eye is now useless, or

(1) [1912] A. C. 496.

(2) [1912] A. C. 496, 499.

practically useless. In the words of the learned judge, "it," the right eye, "has now very seriously diminished in value from a cause wholly unconnected with the accident." The change in circumstance which is relied upon by the respondents, and found by the learned judge, is that on January 25, 1930, the employers offered Brown suitable employment.

By s. 9, sub-s. 3, of the Workmen's Compensation Act, 1925, it is provided that the "weekly payment in case of partial incapacity shall be . . . . one half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment after the accident." The offer of the employers is for employment at a wage of 3*l.* per week, and, if the learned judge is right in holding that the workman was then able to earn in a suitable employment 3*l.* per week, he was right in assenting to the employers' application for the reduction of the amount of the award. Although, in the view the learned judge formed it was not necessary to decide the point, I have come to the conclusion that the learned judge has, in effect, found that on January 25, 1930, at the time of this offer, the workman was unfit for any work at all, and if the medical condition of the workman is to be regarded as on the date of the offer, there is no doubt, in my opinion, that the offer of employment was not suitable, because the evidence is that on January 25, 1930, the virtual loss of the right eye made it impossible for the workman to accept the offer. A progressive deterioration of the right eye, which was apparently deteriorating even before the accident, has rendered the workman almost or quite blind, but in spite of the fact that it is really not seriously disputed that the workman could not do the work offered, either because he was incapable of doing it when he reached the place of employment or because he would be unable, because of the blindness, to reach that place or return, an escort home having been refused by the employers, the learned judge has held that he is able to earn in suitable employment the sum of 3*l.* per week, because he is of opinion that, in considering the suitability of the employment and the reality of the offer, he can only have regard to so much of the physical deficiency as was due to the loss of the left eye caused by the accident and, so far as that eye was concerned, excluding the loss of the right eye not caused by the accident, the judge finds that he would not have been prevented from doing the work offered by reason of the loss of the left eye alone.

In my view, the learned judge was in error in coming to this conclusion. At the time of the review there was an award in existence stating that the workman, by reason of the accident, was totally incapacitated for work. It matters not to my mind whether such incapacity was due to actual inability to do work or inability to get work by reason of the physical blemish. In face of the award it is impossible to contest the fact that he had a legal decision in his favour that he was totally incapacitated. This brings him within s. 1 of the Act, which, prima facie, renders the employers liable to pay compensation. Sect. 9 of the same Act, on which the employers relied, is a section laying down the amount of compensation and, in the case of incapacity, such compensation is total unless there is some difference between the amount of the weekly earnings of the workman before the accident and the average weekly amount which he is earning or able to earn in some suitable employment after the accident. The material words contained in s. 9, sub-s. 3, are those which were formerly in Schedule I. (1.) (*b*) of the 1906 Act and, under that Act, it was pointed out on more than one occasion in various connections that the Schedule, as it then was, must not be resorted to for the purpose of cutting down the right to compensation. Thus, Lord Halsbury L.C. in *Lysons* v. *Andrew Knowles & Sons, Ld.* (1), said: "The language is this: 'If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation.' That I regard as the affirmative or leading enactment. What follows appears to me to be equivalent to a statement that the mode in which that compensation is to be ascertained and determined is to be according to the method and manner provided for in the Schedule. The language itself . . . . is 'liable to pay compensation in accordance with the First Schedule to this Act.'" "The right to compensation is given by the Act. . . . . The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the Legislature is not to be looked for there": per Lord Macnaghten in *Ball* v. *William Hunt & Sons.* (1) And, again, resort cannot be had to the Schedule for the purpose of cutting down the right to compensation. "The intention of the Schedule is to prescribe the scale of compensation and the mode and conditions of its enjoyment": per Buckley L.J. in *Harwood* v. *Wyken Colliery Co.* (2)

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(1) [1901] A. C. 79, 85.

In my view, to interpret the phrase in s. 9 "able to earn in some suitable employment" as meaning suitable so far as the accident is concerned, though not in fact suitable, having regard to the condition of the workman at the time when the offer was made, would be to allow the section which quantifies the compensation to override the effect of s. 1 in a manner which we have been warned repeatedly to avoid. Prima facie, this man is totally incapacitated by accident. If an offer of suitable employment is made to him the employer is entitled, under s. 9, sub-s. 3, to be relieved of liability to the extent provided in that sub-section. But the suitability of employment must be regarded from the point of view of the condition of the workman at the time when the offer was made. On this view, it is not necessary to consider the cases of *Hargreave* (3), *Harwood* (4), or *Lomax.* (5) The case of *Thomson* v. *Watson* (6) was one where a workman and his employer had agreed that partial compensation should be paid, and a memorandum was recorded. The workman enlisted in the army and the employers applied for suspension

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(1) [1912] A. C. 496, 500.
(2) [1913] 2 K. B. 158, 164.
(3) [1912] A. C. 319.
(4) [1913] 2 K. B. 158.
(5) 19 B. W. C. C. 301.
(6) (1915) 9 B. W. C. C. 428.

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of payments on the ground that the workman had made it impossible to assess partial compensation with reference to the average weekly amount which he was earning or was able to earn in some suitable employment or business after the accident. The arbitrator agreed with this view, but on appeal he was held to be wrong. The Lord President says (1): "There appears to me to be no difficulty whatever in ascertaining from the man's physical condition what suitable employment in the industrial sphere he could engage in at the present moment, having regard to his state of health." If this view be correct, it certainly goes some way to show that were this a case of total incapacity arising from direct physical incapacity to work and not from inability to obtain work because of physical disfigurement, the test as to suitable employment would be what the workman could engage in at the present moment. I cannot think that the fact that the incapacity here falls under the principle of *Ball's* case (2) justifies any different interpretation. It would produce the greatest confusion if the time of suitability in cases of total incapacity were to vary according to whether such total incapacity arose out of physical incapacity or physical disfigurement.

The case of *Leach* v. *Dick, Kerr & Co.* (3) also supports this view; in that case, it was held that the material question was whether the work at which he had been employed since the accident was suitable employment. The injured workman had been offered work which he considered suitable after the accident and at which he worked for more than a year, the employers not then requiring him to work overtime. They then paid him overtime, for which he worked a short period, and then came a dispute as to the rate at which overtime should be paid to him, and he refused to work any longer overtime. Lord Sterndale says (4): "Was the job open to him at the time of the award and is it open to him now?" And, again (5): "It may be that at a rehearing the applicant

(1) 9 B. W. C. C. 429.
(2) [1912] A. C. 496.
(3) (1921) 14 B. W. C. C. 135.
(4) Ibid. 135, 137.
(5) 14 B. W. C. C. 138.

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has no evidence to show that he had not then and has not now any offer of suitable work." The insistence in that case of the Court of Appeal that the learned judge should find whether he had suitable work both at the time of the award and original offer, when no overtime was worked, and subsequently when the offer was coupled with an obligation to work overtime, seems to me to indicate that the suitability, though in that case depending on the economic rather than the physical nature of the case, is a question which must be considered throughout the time during which the workman receives the employment, as an element in deciding what he is able to earn in some suitable employment. In *Tannoch* v. *Brownieside Coal Co.* (1) Lord Atkin says (2): "As Lord Loreburn says in *Ball* v. *William Hunt & Sons* (3): 'In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.' It seems to me that on principle this applies where there are several causes making the workman's labour unsaleable in any given employment, but the main cause is a physical defect due to an accident arising out of and in the course of his employment."

It is, in my view, not material to consider whether when the offer is made the employer has such knowledge of the workman's then condition as to make the offer illusory, though the unsuitability of the offer is made more patent by that knowledge. In this case medical warning of the serious deterioration of the right eye had been given to the employers by their own doctor before the offer of employment was made. The onus is on the employers to establish their right to a review when they are claiming a reduction, and it is for them to show, when there is an award of total incapacity in existence, that changed circumstances have arisen whereby

(1) [1929] A. C. 642. (2) [1929] A. C. 648.
(3) [1912] A. C. 496, 499.

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the workman is able to earn in some suitable employment and, therefore, that he is only partially incapacitated. The wording of s. 9 supports the view which I have indicated. It begins: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules therein contained." There is nothing in sub-s. 3 to indicate that the language means anything other than what it says—namely, that the Court shall have regard to the average weekly amount which the workman is able to earn in some suitable employment—that is suitable employment when offered as employment—after the accident. At the time when the offer was made and when the application for review was made, there is, as I read the award of the learned judge, a finding that the employment offered was not suitable in that the workman was unfit for any work at all. The plain language of s. 9, sub-s. 3, is thus not satisfied. The employers have failed to discharge the onus upon them. The workman is, as he was at the time of the making of the original award, totally incapacitated and the only change in circumstances is that there has been made to the workman an unsuitable offer of employment which he is wholly unfit to accept.

The case of *Bevan* v. *Nixon's Navigation Co.* (1) directs us to consider only the capacity of the workman to earn and excludes circumstances which are not personal to himself. Such a doctrine which arises out of the phrase "able to earn" has, in my view, little or no application to the question of suitable employment, for in the latter case it is clear that the suitability of the employment has relation to the personal capacity of the workman and not to extraneous circumstances. I think, therefore, that the line of authority which arises from *Cardiff Corporation* v. *Hall* (2) and its successors has no application here.

Finally, I think that some assistance is derived from the phrasing of s. 9 when it speaks of the workman earning or being able to earn. The word "earning" points to a

(1) [1929] A. C. 44.

(2) [1911] 1 K. B. 1009

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capacity to earn at the time of the review. In *Heathcote* v. *Haunchwood Collieries* (1) Lord Dunedin says, upon the words "is earning or is able to earn": "I have no doubt that, although prima facie what a man is de facto earning must be taken into consideration first, yet it would be perfectly possible for those who objected to that figure being taken, to urge and show that the amount he was earning was not really what he might earn if he took proper steps to get the most remunerative employment he could find." On the facts of this case, it is clear that the workman neither is earning anything nor is able to earn anything in an employment, which by definition must be suitable.

For these reasons I am of opinion (though for reasons different from those given by Greer L.J.) that this appeal should be allowed, that the application for review should have been dismissed, and that the award should be restored to its original form of total incapacity.

*Appeal allowed.*

Solicitors for appellant: *Silkin & Silkin.*
Solicitor for respondents: *Percy W. Cole.*

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(1) (1917) 10 B. W. C. C. 647, 651.

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*April* 4, 8.

# HASTINGS (LORD) *v.* REVENUE OFFICER, WALSINGHAM.

*Rating — Sporting Rights severed but not let—Exercise over agricultural Land —Exemption—Rating Act,* 1874 (37 *&* 38 *Vict. c.* 54), *s.* 3; *s.* 6, *sub-s.* 1; *—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 67*—Agricultural Rates Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 26), *s.* 1.

Where sporting rights over agricultural land are severed but not let the person exercising those rights is not entitled to the exemption from rates conferred on the occupiers of agricultural land by the Agricultural Rates Act, 1929.

CASE stated under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

The appellant, Lord Hastings, was the owner of certain agricultural lands in Norfolk in the parish of Melton Constable in the rating area of the Walsingham Rural District Council. These lands, which approximated 590 acres in extent, were let on yearly tenancies to various agricultural tenants from whom the appellant received rent. In these tenancies the rights of sporting, as defined by s. 6 sub-s. 1 of the Rating Act, 1874 (37 & 38 Vict. c. 54), were reserved by the appellant, who did not let them to anybody, but exercised such rights himself. In the first new valuation list made in accordance with Part II. of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), the above tenants were assessed as the occupiers of the said lands. In estimating the gross and rateable values the directions of s. 6 sub-s. 1 of the Rating Act, 1874 (1), were not followed, but such values were estimated under sub-s. 2 of s. 1 (1) as if the said rights were severed and let. No application under sub-s. 1 was made by any of the occupiers. The appellant was assessed as the owner and occupier of property separately valued and described in the list as "sporting rights over 500 acres" at a rateable value of 4*l.*

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(1) Rating Act, 1874 (37 & 38 Vict. c. 54), s. 6, sub-s. 1: "Where any right of fowling or of shooting or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate, as is paid by him in respect of such increase; and every assessment committee, on the application of the

On June 24, 1929, the appellant, being aggrieved, made a proposal in accordance with s. 37 of the Rating and Valuation Act, 1925, for the amendment of the said list, asking for the deletion of the said assessment on the ground that the sporting rights should not be separately valued and rated. The assessment committee heard the proposal, and on July 5, 1929, gave notice that the amendment would not be allowed. The appellant appealed to Norfolk Quarter Sessions on July 24, 1929, to which appeal the respondent, the revenue officer, could not be made a party, as the provisions of the Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), were not applicable, and this appeal was respited from time to time.

The Walsingham rural district council deposited the draft special list for their area under s. 1 sub-s. 3, and Sch. I. para. 5, of the Act of 1928, in which the said tenants were assessed as above set out—namely, as if the said sporting rights were severed and let. On September 6, 1929, the appellant made objection to the draft special list on the ground that the sporting rights should be included in that list in the assessment of the land over which they were exercised as directed by s. 6 sub-s. 1 of the Rating Act, 1874 (1), and that the gross value of the land should be increased by the value of the rights. The assessment committee dismissed the objection on September 20, 1929. The appellant gave notice of appeal to quarter sessions under s. 1 sub-s. 3, and Sch. I. para. 7 (ii), of the Act of 1928, under which the revenue officer under para. 7 (*g*) of Sch. I. was served with the notice of appeal, this case being then stated by

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occupier, shall certify in the valuation list or otherwise the fact and amount of such increase."

Sub-s. 2: "Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof."

(1) See note (1) ante, p. 278.

arrangement. The appellant contended that the said rights did not constitute a separate hereditament and should not be separately rated, and that the values of the said lands in the occupation of the said tenants should be estimated as if the rights were not severed, and that the rateable values of the said lands, including the sporting rights, should be entered in the draft special list as nil, as being agricultural land, in accordance with s. 1 of the Agricultural Rates Act, 1929 (19 & 20 Geo. 5, c. 26), and the Local Government Act, 1929 (19 Geo. 5, c. 17), s. 67.

*Konstam K.C.* and *Trustram Eve* for the appellant. The sporting rights ought not to have been separately assessed, but should have been included in the values of the various lands over which they were exercised; and as those lands were agricultural lands the rights, as part thereof, were not liable to be rated. These rights come directly within the words of s. 6 sub-s. 1 of the Rating Act, 1874 (1), in that they were severed from the occupation, and were not let, and the owner thereof received rent for the lands. That section enacts that in these circumstances the rights should not be separately valued or rated, but that the gross and rateable value of the land should be estimated as if the rights were not severed. The latter part of s. 6 sub-s. 1 does not involve a separate valuation of the sporting rights as severed from the agricultural lands. The Rating and Valuation Act, 1925, and the Rating and Valuation (Apportionment) Act, 1928, have not altered what is agricultural land and how its rateable value is to be arrived at, and so far as those Acts are concerned sporting rights are in the same position as they were. As a result of s. 67 sub-ss. 1 and 2 of the Local Government Act, 1929, no person after the appointed day shall be liable to pay rates in respect of the occupation of agricultural land, and so long as the first valuation list made under the Act of 1925 is in force agricultural hereditaments included therein will be shown with a gross and net annual value, but with no rateable value. It follows, therefore, that the rateable value of these lands, which includes the value of the sporting rights, is nil. It is only where the person enjoying the sporting rights is not the owner or occupier of the land that the rights, under s. 6 sub-ss. 2 and 3 of the Act of 1874, can be separately rated. In *Rex* v. *Ellis* (1) a right of fishery was held rateable because it was not a mere incorporeal right, but involved the exercise of a right over land. In *Reg.* v. *Williams* (2) the sporting rights were not separately rated, but were treated as having been included in the original letting of the land and as increasing the value of the occupation: see also *Eyton* v. *Mold* (*Overseers*). (3) In *Swayne* v. *Howells* (4) Lord Hewart C.J. said: "Sub-s. 1 of [s. 6 of the Rating Act, 1874] applies to a case where the owner of the land has let the land, reserving to himself the right of sporting. . . . . In that case the right of sporting is not to be separately rated." That decision was followed by the Divisional Court in *Towler* v. *Thetford Rural District Council*. (5)

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(1) See note (1) ante, p. 278.

[*Reg.* v. *Rhymney Ry. Co.* (6) was also referred to.]

*Sir William Jowitt A.-G.* and *Wilfrid Lewis* for the respondents. The appellant's contention is that because the whole, agricultural land goes into the special list, therefore the part thereof, the sporting rights, also goes into the list. The fallacy of that argument lies in the use of the words "whole" and "part," which is the proposition that the corporeal hereditament, land, includes the incorporeal hereditament, sporting rights. Up to 1874 sporting rights severed from the occupation of the land escaped rating altogether, but if the occupier enjoyed them the rateable value of his occupation was increased by the value of the rights: *Reg.* v. *Williams.* (2) In 1874 the Rating Act, 1874, was passed. Under s. 3 of that Act sporting rights when severed from the occupation of the land became a separate hereditament and in some form or another became rateable. The difficulties which arose under the Act began when the Legislature determined

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(1) (1813) 1 M. & S. 652.

(2) (1854) 23 L. T. (O. S.) 76.

(3) (1880) 6 Q. B. D. 13.

(4) [1927] 1 K. B. 385, 392.

(5) (1929) 28 L. G. R. 108.

(6) (1869) L. R. 4 Q. B. 276.

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to contribute to the rates on agricultural land. This was first done on a wide scale under the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), whereby the State paid a proportion of such rates, which was increased by the Agricultural Rates Act, 1923 (13 & 14 Geo. 5, c. 39), and now, by ss. 1 and 2 of the Agricultural Rates Act, 1929, the whole of the rates of an "agricultural hereditament" are so paid. By s. 5 of the latter Act "agricultural hereditament" has the same meaning as in the Rating and Valuation (Apportionment) Act, 1928, s. 2, and that definition includes corporeal rights only, and cannot include sporting rights. After the passing of the Act of 1896 the occupier of the land in the case of sporting rights, severed but not let, continued to be rated on the value of the land as increased by the value of the sporting rights; but whereas it had not previously been necessary, except at the request of the occupier under s. 6, sub-s. 1, of the Act of 1874, to make any separate entry as to the value of these rights, it now became necessary to split the valuation into its component parts so as to show how much of the value was attributable to the land and the sporting rights respectively. And the Act of 1928 by s. 1 sub-s. 1 shows that agricultural land must be separated from all other hereditaments in the valuation list, that is, separated from (inter alia) sporting rights, which are and have been since 1874 a separate hereditament. When the occupier himself enjoys these rights then he does get the benefit of this legislation. Sect. 211 sub-s. 1 (*b*) of the Public Health Act, 1875 (38 & 39 Vict. c. 55), contained similar provisions exempting occupiers of "land used as arable meadow or pasture ground only" from part of the general district rate, and in *Alton Urban District Council* v. *Spicer* (1) it was held that a person who rented the sporting rights over lands which were included within the above sub-section was not entitled to benefit thereby. This was the first attempt by one enjoying sporting rights to get a benefit which the Legislature clearly intended for the occupier of agricultural land only.

(1) [1904] 1 K. B. 678.

*Konstam K.C.* in reply. It is admitted by the respondent that the occupier of the land who exercises these sporting rights gets the benefit of this legislation; it would be anomalous to deny the same benefit to a person who exercises them, merely because he does not also occupy the land. The argument of the respondent must be that s. 6 sub-s. 1 of the Rating Act, 1874 (1), in so far as it directs that these sporting rights are not to be separately valued or rated, has ceased to have any operation. A rateable hereditament is one that can be separately rated, and the effect of an enactment that sporting rights are not to be separately rated is to say that they are not a rateable hereditament. Assuming, however, that these rights are a rateable hereditament some one must be rateable in respect of them, and that, in view of s. 6 sub-s. 1 of the Act of 1874, must be the occupier of the lands over which they are exercised.

LORD HEWART C.J. This is a case stated on an appeal from quarter sessions against the decision of an assessment committee. I do not propose to read the whole of the case. It is enough to say that the appellant, Lord Hastings, is the owner of certain agricultural lands in the rating area of the Walsingham rural district council in Norfolk. Those lands are let to various agricultural tenants on yearly tenancies, and the appellant receives rent from those occupiers. The total of the areas of the different holdings amounts roughly to 590 acres. In those yearly tenancies the rights of sporting are reserved to the appellant, and those rights are not let by him to any person; in fact, the appellant is entitled to, and does, exercise the rights of sporting upon the lands. In those circumstances the first new valuation list was made in accordance with Part II. of the Rating and Valuation Act, 1925, and in the estimate of the gross, net annual and rateable values of those lands, the words of s. 6 sub-s. 1 of the Rating Act, 1874, were not followed, but the values were estimated as if the sporting rights were not only severed but let, and in that first valuation list the appellant himself

(1) See note (1) ante, p. 278.

was assessed as owner and occupier of property separately valued and described as sporting rights over 500 acres. The appellant accordingly made a proposal, as it is called, in accordance with s. 37 of the Rating and Valuation Act, 1925, for amendment of the first new valuation list, which by that time had become the valuation list in force. This proposal was that the assessment upon him should be deleted because, as he said, the sporting rights ought not to have been separately valued or rated. The assessment committee heard that proposal, and gave notice to the appellant that his proposal for amendment of the list would not be allowed. Thereupon the appellant gave notice of appeal to quarter sessions against that decision. Meantime, in accordance with the Rating and Valuation (Apportionment) Act, 1928, the Walsingham rural district council, as the rating authority, deposited under Sch. I. (2.) what is called a draft special list for their rating area, and in that special list the various tenants were assessed as occupiers, and they were assessed as occupiers in respect of the values therein estimated. The appellant was aggrieved by that special list, for the reason that the value of the sporting rights was not added to the value of the agricultural land as such, and accordingly he made objection to the special list. The objection was heard by the assessment committee, and was dismissed. Aggrieved by that decision, the appellant gave notice of appeal to the court of quarter sessions for the county of Norfolk, and it is in consequence of that appeal, respited as it was, that this special case is now stated.

The question which is involved, and it is an interesting question, may be stated quite simply. That question is, how in relation to the law of rating, as that law has now become, do sporting rights stand where they are severed from the occupation but are not let? The argument on the part of the appellant may be shortly stated in this way. As a result of successive statutes agricultural land properly so called has now ceased to have a rateable value, but it is said, where sporting rights, although severed from the occupation are not separately let, they form a part of the agricultural land, and as the whole has ceased to be rateable, it follows that that part also has ceased to be rateable. It matters not, the appellant contends, that in certain other circumstances—namely, where the sporting rights are not only severed but are also made the subject of a separate letting—they have a rateable value: where they are not the subject of a separate letting they form a part of the agricultural land of which, as the law has now developed, the rateable value is nil. The true conclusion, therefore, as he submits, is that the rateable value of the agricultural land, plus the sporting rights, severed though not separately let, is nil.

Against that view various contentions are urged on the part of the present respondent, who is the revenue officer for the district of the Walsingham rural district council; and one is bound to say at first blush that it would be a little surprising if the Legislature, in its anxiety to grant relief from rates in certain hard cases, had deliberately or inadvertently relieved sporting rights from rateability where they are severed from the occupation but are not separately let. If that were the true conclusion to be derived from these statutes, it would obviously be necessary to give effect to it; but is it the true conclusion? The history of the matter is capable, I think, of tolerably brief statement.

By s. 3 of the Rating Act, 1874, it was provided that the existing legislation with regard to the poor rate should extend to hereditaments other than those mentioned in the Act of Elizabeth, and accordingly on and after the commencement of the Act of 1874, the poor rate Acts did extend to certain newly named hereditaments in like manner as if they were mentioned in the Act of Elizabeth, and among these hereditaments so named for the first time was: "(2.) To rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." Those last words are of importance. It is not suggested that the sporting rights are the subject of rating when they are not severed from the occupation of the land. Then followed certain provisions in s. 6 with reference to the case where the sporting rights are severed indeed from the occupation of the land but are not let, and in that case it was provided that, where in such a case the owner of sporting rights receives rent for the land, the sporting rights shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed. Thereupon, where the rateable value was increased by reason of its being so estimated, it was provided that the occupier of the land might deduct from his rent such portion of any poor or other local rate as was paid by him in respect of that increase; and it was further provided that every assessment committee on the application of the occupier should certify in the valuation list, or otherwise, the fact and amount of that increase. It is to be observed that in s. 6 sub-s. 1 the words are " the said right," that is, the right of fowling, of shooting or taking or killing game, etc., " shall not be separately valued or rated." That is a different thing from saying that the right is not to be valued or that it is not to be rated. On the contrary, the section shows that regard is to be had to the value of the sporting rights, and, where the value of the land is increased by reason of the sporting rights, special arrangements are made for the proper adjustment of the burden. What is provided there is that in the case named, that is to say, the right severed but not let, there should be no separate valuation or separate rating of those rights. But, although that is so, sporting rights by s. 3 were made and remain a hereditament. It was in the state of affairs so produced that steps were taken from time to time to relieve the burdens falling upon agricultural land, and so we find in the Agricultural Rates Act, 1896, by s. 5, it is provided that: " In every valuation list and in the basis or standard for any county rate, and in any valuation made by the council of a borough or any other council for the purpose of raising the borough or other rate: (*a*) where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament; and (*b*) in every case the total rateable value of the agricultural land in each parish shall be stated separately from the total rateable value of the buildings or other hereditaments in such parish." And again, by s. 6 sub-ss. 1 and 2 of the Act, for the purpose of certain returns which are made obligatory, statements showing the gross estimated rental and rateable value of the agricultural land in a parish and in the case of any hereditament separately valued, which consists in part of agricultural land and in part of buildings or other hereditaments, of each such part, shall be made by the overseers of every parish and corrected by the assessment committee. Relief was accordingly given so far as the burdens upon agricultural lands were concerned, and in the Act of 1896, in s. 9, the definition of agricultural land was as follows: "The expression 'agricultural land' means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens, other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course."

After some intermediate steps, important indeed in detail, but not varying the principle, further relief was given to agricultural land, until at length by the Rating and Valuation (Apportionment) Act, 1928, with a view to the grant of further relief, provision was made for the actual physical distinction in valuation lists of certain classes of hereditaments, and by s. 1 sub-s. 1 of that statute it was provided that "In every valuation list the classes of hereditaments hereinafter mentioned shall, in the prescribed manner, be distinguished from each other and from all other hereditaments"—and first in the catalogue is "(*a*) agricultural hereditaments." One looks to see what the definition of agricultural hereditaments is. It is provided by s. 2, where it is said that "the expression 'agricultural hereditament' means any hereditament being agricultural land or agricultural buildings"; and further the expression "agricultural land" is defined as meaning "any land used as arable meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one-quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens (other than as aforesaid), pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course." And finally to complete the history of this relief, by the Local Government Act, 1929, which was passed on March 27, 1929, and which is future from the point of view of some of the dates comprised in the present case, it was provided by s. 67 sub-s. 1 that "No person shall, in respect of any period beginning on or after the appointed day [October 1, 1929: see s. 134], be liable to pay rates in respect of any agricultural land or agricultural buildings or be deemed to be in occupation thereof for rating purposes, and notwithstanding anything in the principal Act, or in the Rating and Valuation (Apportionment) Act, 1928, no such land or buildings shall be included in any rate made in respect of a period beginning on or after that date." It is in those circumstances, founding himself indeed on the legislation leading up to the Act of 1929, but reinforcing the argument by the provisions of that Act when it comes to be enforced, that the appellant contends that these sporting rights severed but not let have a nil value, because the land over which they are exercised is agricultural land having a nil value.

The respondent contends, on the contrary, that the rights of sporting constitute a separate hereditament or hereditaments, and that therefore it was necessary to treat them as such for the purposes of the said new valuation list and of the said special list. In my opinion that contention is correct. I think upon the true construction of the Act of 1874 that conclusion follows; and although it may well be that in certain cases some of the machinery comprised in s. 6 of the Act of 1874 is not indeed expressly repealed, but in effect rendered obsolete. I think this contention, that the rights of sporting severed from the occupation but not separately let constitute a separate hereditament, is correct.

A second contention is that these rights of sporting are not an agricultural hereditament, or alternatively are not part of an agricultural hereditament or of agricultural hereditaments. That contention, too, I think is sound, and with regard to that contention reference may be made to the case of *Alton Urban District Council* v. *Spicer* (1), where it was held that where a right of sporting over land is severed from the occupation of the land and is let, s. 211 of the Public Health Act, 1875, does not apply to entitle the lessee of that right to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof. In that case Lord Alverstone C.J., speaking of the Rating Act, 1874, said (2): "The Act therefore created a new rateable hereditament independent of occupation in the ordinary sense of the word when considered as the test of rateability"; and a little lower down: "It was argued for the respondent that he was entitled by that provision to be rated in respect of his sporting right at one-fourth of the net annual value. The answer is that he is not an occupier of land used as arable, meadow, or pasture ground only, or as woodland; he is the statutory occupier, in the sense that the Act says he is to be rated as if he were the occupier, of a special hereditament—namely, the sporting right." Mutatis mutandis, I think those considerations apply, and just as land used mainly or exclusively for the purposes of sport is excepted from the definition of agricultural land, so I think a fortiori the incorporeal hereditament consisting in sporting rights where they are severed from the occupation is also excepted from the definition of agricultural land. It is not true, therefore, in my opinion, to say that the part takes the complexion of the whole. The fallacy consists in treating the incorporeal hereditament of sporting rights as being a part of the corporeal hereditament of agricultural land.

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(1) [1904] 1 K. B. 678.

(2) [1904] 1 K. B. 681.

Further, the respondent contended that the said hereditaments—namely, the rights of sporting — were properly excluded from the special list, in that they were not treated as forming part of that which was valued at nil. That contention, I think, follows from the other; and again, that the net annual value of the said separate hereditaments—namely, the rights of sporting—should be stated separately and not added to the net annual value of the said land in the said new valuation lists; and again, that no addition should have been made to and/or no amount included in the value of the said lands appearing in the said special list in respect of the said separate hereditaments. All these contentions appear to me to be sound and final. Certain words being omitted, the sixth contention for the respondent set out in the case is: "That the decision of the assessment committee upon the appellant's objection herein was correct . . . . in so far as it related to the said special list but that the said separate hereditaments — namely, the rights of sporting (not being agricultural hereditaments), should have been entered in the said valuation list as five separate hereditaments and the occupiers of the same stated therein to be . . . . the persons entered in the said special list as the occupiers of the lands . . . . on which the said sporting rights are exercised."

I refrain from the task which has been indicated to the Court of settling the form of valuation list which is suitable to the new circumstances. I am content to express the view that these contentions as to the true nature of sporting rights severed but not let, are in substance, in my opinion, correct. It is suggested that the crux arises, or may hereafter arise, by reason of the provisions of s. 67 sub-s. 2 of the Local Government Act, 1929. If and when that difficulty does arise no doubt suitable steps will be taken to meet it. The difficulty consists in these words. The sub-section provides: "For the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value, and, notwithstanding anything in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list." To construe this sub-section is not necessary for the purposes of the present case, and yet the difficulty is indicated as one which lies in wait for rating authorities at no long time from to-day. I cannot help thinking that that sub-section is to be read closely in connection with the limiting definition of agricultural land. True, no particulars with respect to agricultural land, properly so called, strictly defined, are to be included in any subsequent valuation list, but, speaking for myself, that does not seem to me to raise insuperable difficulty in the way of sufficiently identifying the sporting rights exercised over land which is agricultural.

In these circumstances, and for these reasons, without entering into some further questions which do not appear to be necessary for decision in this case, I think that the present appeal ought to be dismissed.

AVORY J. I am of the same opinion. The cardinal question in this case is whether the sporting rights do or do not constitute a separate hereditament or hereditaments, and whether they should be treated as such for the purposes of the new valuation list and of the special list. The Act of 1874 beyond question has made sporting rights when severed from the occupation of the land a rateable hereditament, and as such it is liable, and remains liable, to be treated as a separate rateable hereditament. The Agricultural Rates Act, 1896, by s. 5, required that: "In every valuation list, . . . . (*a*) where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament." I have no doubt that that statute meant to include in the words "other hereditament" the sporting rights which had been by the Act of 1874 constituted a rateable hereditament; and there is nothing in the Acts of 1928 or 1929, in my opinion, to destroy the character of sporting rights when severed from the occupation of land as separate rateable hereditaments. In those circumstances, whatever difficulty may practically arise when sub-s. 2 of s. 67 of the Act of 1929 comes into operation, I am satisfied that for the purposes of this present case the answers which my Lord has given to the several contentions are the correct ones, and that for those reasons this appeal should be dismissed.

BRANSON J. I agree.

*Appeal dismissed.*

Solicitors for appellant: *Peacock & Goddard, for Hill & Perks, Norwich.*

Solicitor for respondent: *Treasury Solicitor.*

W. L. L. B.

1930
*May* 6, 7, 8, 9, 20, 21, 22.

## MARCONI'S WIRELESS TELEGRAPH COMPANY, LIMITED *v.* NEWMAN AND OTHERS.

[1929. M. 698.]

*Bankruptcy—Deed of Inspectorship—Royalties—Liability of Inspector and Committee of Inspection—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 19, 20—*Deeds of Arrangement Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 47), *s.* 1.

N. and B. were the holders by novation of a licence from the plaintiff company to use and exercise certain inventions relating to wireless apparatus which were the subject of letters patent owned or controlled by the plaintiff company subject to the payment of certain royalties by N. and B. to the plaintiff company. N. and B. got into difficulties, and were unable to meet their obligations as they became due owing to overtrading, but they claimed to be still solvent. At a meeting of the trade creditors it was agreed that a committee of inspection should be appointed and that N. and B. should execute a deed of inspectorship. The deed, which was executed on May 6, 1928, was in the usual form, and in all material particulars the same as that considered by the Court in *Easterbrook* v. *Barker* (1870) L. R. 6 C. P. 1. By the deed N. and B., the debtors, in consideration of a release of their indebtedness to the assenting creditors, assigned their real and personal estates to C. as inspector upon trust to allow N. and B. " henceforth to manage and carry on their said business " subject to the covenants and conditions of the deed. N. and B. undertook to carry on the business or wind it up as the inspector and committee should think best. In a circular which was sent out by C., the inspector, on September 10, 1928, announcing that the deed of inspectorship had been executed, it was stated that " all orders for goods required for the purpose of carrying on the business will be issued on my official order forms in the usual way and will be paid for by me." The inspector and the committee of inspection left the conduct of the business subsequent to the execution of the deed of inspectorship to N. and B. The plaintiffs brought an action by which they claimed royalties upon wireless sets constructed and sold by N. and B. since September 6, 1928. The action was brought against N. and B. and also against the inspector and the members of the committee of inspection personally:—

*Held*, that the deed of inspectorship did not constitute a partnership between N. and B. and their creditors, or between N. and B. and the inspector and the committee, also that N. and B. did not become the agents of the inspector or of the committee to carry on the business, but that the business remained the business of N. and B. and that therefore the plaintiffs' claim for royalties against the inspector and committee of inspection failed.

*Easterbrook* v. *Barker* L. R. 6 C. P. 1; *Redpath* v. *Wigg* (1866) L. R. 1 Ex. 335; and *Cox* v. *Hickman* (1860) 8 H. L. C. 268 followed.

ACTION tried before Branson J. without a jury.

The plaintiffs were the owners or controllers of certain letters patent in respect of inventions relating to wireless apparatus.

The defendants Newman and Baynes were in August, 1928, the holders by novation of a licence from the plaintiffs to use and exercise the inventions, the subject of the said patents, and they carried on business as manufacturers of wireless apparatus under the name of the "Langham Radio."

The remaining defendants were the inspector and committee of inspection appointed under an inspectorship deed made by the defendants Newman and Baynes (hereinafter referred to as "the debtors") on September 6, 1928.

The plaintiffs' claim was for royalties upon sets constructed and sold in the name of Langham Radio since September 6, 1928.

The following statement of facts is taken from the judgment:—

The material facts are as follows: On May 6, 1926, the plaintiffs granted a licence to one Havercroft, trading as Langham Radio, to use their patents. The licence was a personal licence which the licensee covenanted not to assign. It was revocable on non-payment of royalty when due and on any breach of agreement by the licensee not made good within seven days of notice or on bankruptcy or compounding with creditors by the licensee. It provided for a royalty of 12*s.* 6*d.* in respect of every valve holder employed in apparatus sold by the licensees for the purposes specified in the licence.

The debtors succeeded to Havercroft in the business of Langham Radio, and the plaintiffs were in the early part of 1928 contending that the debtors had become the licensees under the licence of May 6, 1926, and as such were liable for many thousands of pounds of royalties. On April 18, 1928, the plaintiffs issued a writ against the debtors for an account and payment of royalties. The debtors defended upon the ground (inter alia) that they had come under no contractual obligation towards the plaintiffs.

In August, 1928, the debtors were unable to meet their obligations as they became due, and approached their creditors by a circular letter of August 15 signed by the defendant Cork. The letter stated that Cork was informed that there was no question of insolvency, but only a temporary shortage of liquid capital. The principal trade creditors met, and on August 23, 1928, another circular was sent round by the defendant Cork. In that circular it was stated that a balance sheet prepared by the firm's accountant showed that the assets, excluding goodwill, exceeded the liabilities by some thousands of pounds, that according to the information available from the firm the present position had been brought about entirely through overtrading, and the circular went on to state that: "The partners are anxious that everybody should be paid in full and the creditors present at the meeting unanimously agreed to give them an opportunity of doing so," and that "in order to secure the creditors' position and to give the firm an opportunity of resuscitating their position and preserving the continuity of the business" the business should be turned into a limited liability company, and the whole of the details be carried through under the supervision of a committee of inspection consisting of the representatives of certain named firms. The circular went on to state that: "Whilst the scheme is being carried through the business will be preserved and continued and all goods required will be paid for by the firm in cash."

On August 28 Cork, having been informed by the plaintiffs that they had a heavy claim against the debtors, sent them copies of the circulars of August 15 and 23, and certain correspondence then passed. On August 29 the plaintiffs wrote to Cork acknowledging receipt of the circulars and telling him that the plaintiffs had an action pending against the firm, which they were informed would result in a judgment in the region of 20,000*l.* or 25,000*l.* On September 6 Cork wrote again to Mr. Bishop, the solicitor for the plaintiffs, and told him that a meeting of the committee of inspection had been held and that the committee had unanimously decided that Newman and Baynes should execute immediately a deed of inspectorship with an assignment clause in order that the whole of the assets of the estate might be protected and to secure the continuity of the business, and he told him that such a deed was executed. On September 8 that letter was acknowledged by Mr. Bishop, who said he observed what had been done with a view to protecting the assets of the company, and continued: "Under the terms of this licence granted by my clients to the Langham Radio to manufacture, Langham Radio agree to render monthly returns of sales showing the royalties payable. No returns whatever have been rendered since December last, and consequently there is no doubt a very considerable sum due to my clients in respect of that period alone." To that, on September 10, Cork replied that he was going to Lille, and would be returning later. "By that time I hope to be in a position to have a report from Messrs. Langton and Passmore." Messrs. Langton and Passmore were the solicitors who were defending the action which the plaintiffs had brought against the debtors.

On September 10 another circular was sent out signed by the defendant Cork. It stated that a deed of inspectorship had been executed and also that "all orders for goods required for the purpose of carrying on the business will be issued on my official order forms in the usual way and will be paid for by me." Mr. Nichol, the plaintiffs' clerk in charge of the royalty section, stated that he considered that circular letter with the plaintiffs' solicitor, and as a result of that conference decided not to cancel the licence of May 6, 1928.

The inspectorship deed, which was executed on September 6, 1928, was in a very usual form. In consideration of a release of their indebtedness to the assenting creditors they assigned their real and personal estates, with certain immaterial exceptions, to Cork as inspector upon trust to allow the debtors "henceforth to manage and carry on their said business," subject to the covenants and conditions of the deed.

*Sir Walter Schwabe K.C.*, *H. D. Samuels* and *F. Soskice* for the plaintiffs.

*A. T. Miller K.C.* and *Tindale Davis* for the defendant W. H. Cork, the inspector under the deed of inspectorship.

*S. L. Porter K.C.* and *J. S. Watts* for the defendant W. G. Adie.

*Swords K.C.* and *G. O. Slade* for the defendants H. F. Gidden, P. S. Booth and W. A. J. Osbourne.

*Macaskie K.C.* and *Gerald Gardiner* for the defendants A. M. White, H. Bowyer and L. O. Terrell.

The defendant Newman was not represented.

The defendant Baynes appeared in person.

The arguments sufficiently appear from the judgment.

*Cur. adv. vult.*

May 22. BRANSON J. read a judgment in which he set out the facts stated above and continued: The plaintiffs' claim is for royalties upon sets constructed and sold in the name of Langham Radio since September 6, 1928. The claim is put in a number of alternative ways by the statement of claim as amended after the close of the plaintiffs' case. It is alleged: (*a*) that the deed constituted the inspector and the committee partners with the debtors; (*b*) that the deed constituted the debtors the agents of the inspector and/or the committee to carry on the business, and that the debtors have continued to carry on the business subject to the direction and control of the inspector and/or the committee, and in so doing have used the inventions of the plaintiffs; (*c*) that the scheme of the deed was abandoned, and that the inspector and/or the committee themselves carried on the business and used the inventions, and it is alleged that in each case the business was so carried on and the inventions used with the knowledge and consent of the plaintiffs. Upon this it has been contended, firstly, that there was a novation of contract with the alleged new partnership or the inspector and/or the committee under which the plaintiffs can claim royalty contractually, or secondly, that the inspector and/or the committee in fact carried on the business and used the inventions and are liable to the plaintiffs as for money had and received for such part of the price of every set made and sold as represents the amount of the royalty which the plaintiffs could charge; or thirdly, that the inspector and/or the committee, having received moneys which he and they knew arose from sales of sets and included something for royalty, are liable as for money had and received for such part of the price as represented royalty. As almost every phrase in the pleading contains the words "and/or," there may be other alternatives pleaded, but those which I have set out were the ones relied on before me. The defence of the defendants, other than Newman and Baynes, was a denial of liability, and at the close of the plaintiffs' case each one of them submitted that he had no case to answer. Being of opinion that it was wisest in the circumstances to hear the whole of the evidence, I declined to stop the case, and now all the evidence has been called.

I do not think it is necessary that I should refer to the deed of inspectorship in detail; it is in all material particulars the same as that which was considered by the Court of Common Pleas in *Easterbrook* v. *Barker* (1), and upon the authority of that case it is perfectly plain that the business remained the business of the debtors, who undertook to carry it on or to wind it up, as the inspector and committee should think best. *Cox* v. *Hickman* (2); *Redpath* v. *Wigg* (3); and

(1) L. R. 6 C. P. 1.

(2) 8 H. L. C. 268.

(3) L. R. 1 Ex. 335.

*Easterbrook* v. *Barker* (1), to which I have already referred, are authorities which show that such a deed does not constitute a partnership between the debtors and their creditors or between them and the inspector and the committee. *Easterbrook* v. *Barker* (1) shows also, if authority is needed, in view of the language of the deed in question, that the debtors do not become the agents of the inspector or of the committee to carry on the business.

Sir Walter Schwabe did not indeed base his case before me upon partnership or upon agency, but he contended in the first place that the evidence showed that notwithstanding the provisions of the deed the inspector and the committee had taken the conduct of the business out of the hands of the debtors and carried it on themselves. In support of this contention of fact he relied upon the paragraph in the letter of September 10 stating that all orders for goods would be paid for by Cork, he relied upon certain expressions in the minutes of the committee of inspection where the committee speak of carrying on the business, on the affidavit under Order XIV., where Cork speaks of carrying on the business, and upon the fact that orders given for supplies were confirmed by Cork. Some of these expressions might, if unexplained, afford some evidence of a carrying on of the business by Cork and the committee, but when the evidence as a whole is considered it is, in my opinion, clear beyond argument that Cork and the committee acted strictly within the deed, leaving the conduct of the business in the hands of Newman and Baynes, as the deed provided that it should be left. This is established by the evidence of Cork and of Baynes. Sir Walter admitted in argument, as he was bound to admit, that if he failed on this point of fact he could not establish a novation of contract between the plaintiffs and either the inspector or the committee. I need therefore say no more upon that head.

This finding of fact also disposes of the first of the two ways in which Sir Walter puts his case upon the count of money had and received. The business was carried on as before the inspectorship by Newman and Baynes. Newman and Baynes, according to the judgment obtained against them by the plaintiffs in the action commenced on April 18, 1928, were licensees of the plaintiffs, and entitled by contract to make and sell sets including Marconi patents, and bound by contract to pay specified royalties for sets sold. Newman and Baynes continued after the inspectorship to sell sets with a notification upon them, that the sets were licensed under the Marconi patents and the price of those sets was paid to Newman and Baynes. They were entitled by their contract with the plaintiffs to receive such sums as they could get for sets so sold, and no part of that price was in any sense money belonging to the plaintiffs. The plaintiffs' right as against Newman and Baynes to be paid royalties did not depend upon Newman and Baynes getting paid by their purchasers, and I think it plain that upon the real facts of the case no claim for money had and received based upon the waiver of a tort can arise, for Newman and Baynes were guilty of no tort at all in selling the sets.

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(1) L. R. 6 C. P. 1.

Lastly, it was urged that the inspector and/or the committee knew that the sets being sold were sets in respect of which a royalty became due to the plaintiffs, knew also that the price obtained by Newman and Baynes was enhanced by the representation that the sets were licensed, and knew further that there was no fund out of which Newman and Baynes could pay royalties to the plaintiffs except the moneys obtained by such sales, which moneys the inspector took from Newman and Baynes under the deed, and it has been contended that in such circumstances the plaintiffs may recover from the inspector and/or the committee such portion of those moneys as represents the enhancement of the price due to the statement that the sets were licensed under the plaintiffs' patents.

I am not satisfied that the inspector and the committee knew that the sets as made after September 6 involved the use of Marconi patents, but it is unnecessary to examine this point, because even assuming the fact to have been that they did know, the plaintiffs' contention is, in my opinion, unsound. If it could be said that any part of the moneys received by Newman and Baynes was money which belonged to the plaintiffs, the case of *Reid* v. *Rigby & Co.* (1) would be in point; but, that element being wanting, there is no principle of which I am aware upon which this contention of the plaintiffs can be based. Even the famous dictum of Lord Mansfield in *Moses* v. *Macferlan* (2), which was referred to, if it had stood—as it does not stand after such cases as *Sinclair* v. *Brougham* (3) and *Holt* v. *Markham* (4)—would not have availed the plaintiffs. For the true position in September, 1928, was, in my opinion, that the plaintiffs were content to allow the business of Newman and Baynes to continue as before in the hope and expectation that after surmounting the crisis, which all believed to be but temporary, Newman and Baynes would be able to pay such royalties as might be incurred by them through a continuance of their trading.

The result is that the plaintiffs' claim fails as against the inspector and the committee, and must be dismissed with costs. With regard to the plaintiffs' claim against Newman and Baynes, they have been adjudicated bankrupts, but no one has applied to stay the action, and I think therefore that I must express my view upon the claim and enter judgment and then leave the trustee to take such steps as he may think right. That makes it necessary that I should say a word or two with regard to the defence of the defendants Newman and Baynes. Newman did not appear, and was not represented at the trial, but Baynes appeared in person, and contended that from a date in October he ceased to concern himself with the business, as he and Newman took different views as to how it should be conducted, and he found himself powerless to secure the prevalence of his own view. In my opinion, however, Baynes remained a partner in the business, and as such became liable under the licence for the royalties incurred by sales of sets by the firm. The result is that I think the plaintiffs are entitled to succeed against both

(1) [1894] 2 Q. B. 40.
(2) (1760) 2 Burr. 1005.
(3) [1914] A. C. 398.
(4) [1923] 1 K. B. 504.

Newman and Baynes in respect of the sum claimed in this action.

1930

MARCONI'S WIRELESS TELEGRAPH CO. v. NEWMAN.

*Judgment for the plaintiffs against Newman and Baynes.*
*Judgment for the other defendants.*

Solicitor for the plaintiffs: *G. R. Bishop.*

Solicitors for the defendants Cork, White, Bowyer, & Terrell: *Kenneth Brown, Baker, Baker.*

Solicitors for the defendant Adie: *W. & W. Stocken.*

Solicitors for the defendants Gidden, Booth and Osbourne: *Stanley Evans & Co.*

R. F. S.

## HOLMES *v.* PAYNE.

[1929. H. 4257.]

1930
*May* 1, 2, 12.

*Insurance—Pearl Necklace—Disappearance—Agreement by Underwriter to provide Articles of equal Value—Provision of other Articles—Subsequent Discovery of Necklace—Claim by Underwriter for Relief—" Loss "—Mistake—Rescission of Agreement—Return of other Articles.*

By a Lloyd's policy the plaintiff and other underwriters insured the defendant against " all loss wheresoever which the assured may sustain by the loss of or damage to " certain specified articles, one of which was a pearl necklace. During the currency of the policy the defendant missed the necklace and informed the representative of the underwriters that she had lost it. She made a thorough search of her house for it, and afterwards at the suggestion of the underwriters a further search and inquiries were made, but without result. An agreement was then entered into between the underwriters and the defendant that they should give her by way of replacement of the necklace other articles of jewellery up to its insured value. After she had received under the agreement articles of somewhat less than a third of that value the necklace was found at her house, where it fell out of an evening cloak in which it had become concealed. In an action by the plaintiff against the defendant claiming a declaration that the necklace had not been lost, rescission of the replacement agreement, and the return of the articles which she had received under that agreement :—

*Held*, that the replacement agreement was in the circumstances a valid and binding agreement unaffected by mistake or misrepresentation, that on its true construction it did not contain an implied term that if the necklace should be found the agreement should be void ; and that under it the defendant was entitled to retain the articles which she had received and to receive other articles up to the agreed value, the underwriters taking the necklace as salvage.

*Da Costa* v. *Firth* (1766) 4 Burr. 1966 applied.

*Semble*, that there was a loss of the necklace within the meaning of the policy.

*Polurrian Steamship Co.* v. *Young* [1915] 1 K. B. 922 and *Roura & Forgas* v. *Townend* [1919] 1 K. B. 189 held applicable.

ACTION in the Commercial List tried by Roche J. without a jury.

Mrs. Walter Payne, of 16 York Terrace, Regent's Park, was the owner of certain articles of jewellery including a pearl necklace which she had bought from Mr. H. H. Plante, a jeweller. Through his introduction she had insured these articles at Lloyd's. The policy current at the time of the occurrences hereinafter mentioned was dated November 7, 1928, and it provided that, in consideration of the premium mentioned, the underwriters agreed to insure Mrs. Payne "against all loss wheresoever which the assured may sustain by the loss of or damage to the property herein specified . . . . during the space of twelve calendar months commencing on the 7th November, 1928, and ending on the 6th November, 1929. . . . . Property insured, 1199*l*. On jewellery and/or furs and/or valuables as per specification, so valued." One of the articles mentioned in the specification was the pearl necklace above referred to, which was valued at 600*l*.

On November 20, 1928, Mrs. Payne missed the necklace, and on the following day she wrote to Mr. Plante as a representative of the underwriters stating that she had lost it. She made a search for it both of her house and of her articles of wearing apparel, but without avail. A Mr. A. A. Summers, an experienced assessor, acting for the underwriters, saw her at her house, and at his suggestion further search and inquiries both in and out of her house were made, but these also were without result. On December 4, 1928, Mr. Summers on behalf of the underwriters wrote to Mrs. Payne suggesting that, if the necklace was not found in the course of the next few days, she should see Mr. Plante with a view to his replacing it for her; and shortly afterwards he authorized

Mr. Plante to supply her with jewellery to the value of 600*l.* Mrs. Payne acceded to these proposals and a replacement agreement was thus formed between her and the underwriters. By arrangement with Mr. Plante she selected in December, 1928, and February, 1929, articles of jewellery of the value to her of 264*l.*, and at the date next mentioned she was in process of selecting further articles to exhaust the balance of the 600*l.*

On February 27, 1929, the necklace was found by Mrs. Payne's sister. She was trying on an evening cloak which Mrs. Payne had contemplated disposing of, and during the trying on the necklace fell out of the cloak. That cloak had been included in the search previously made, and had been worn by its owner several times after she had missed the necklace, but on none of these occasions had the necklace fallen out or been felt by the wearer. The most probable supposition was that some part of the fur of the collar or cuffs of the cloak had come unstitched, and that the necklace had got into and then out of its place of concealment. The underwriters, on being informed of the discovery, took the view that the replacement agreement was void as having been made under a common mistake of fact that there had been a loss of the necklace, and requested Mrs. Payne to return the articles of jewellery which she had received from them, but she refused to comply with that request and offered them the necklace as salvage.

On December 17, 1929, Mr. Harry Holmes, one of the underwriters, therefore brought the present action against Mrs. Payne, in which he claimed (1.) a declaration that the necklace was never lost within the meaning of the policy; (2.) rescission of the replacement agreement of December, 1928; and (3.) the return by the defendant of the articles of jewellery which she had received. In his points of claim the plaintiff alleged (para. 2), that on November 21, 1928, the defendant, by letter addressed to Mr. Plante, as agent for the plaintiff, and verbally at an interview with the plaintiff's agent, Mr. Summers, informed the plaintiff that she had lost the necklace and that her residence had been thoroughly searched, and that the necklace must have been lost at some place other than her residence; (para. 3) that in December, 1928, the plaintiff by his agent Mr. Plante verbally agreed with the defendant that in lieu of the payment to her of 600*l.* Mr. Plante should supply her with jewellery of an equivalent value; and that the plaintiff entered into that agreement in reliance on the statements made by the defendant, as in para. 2 mentioned and in the belief that the necklace had been actually lost within the meaning of the policy; and (para. 7) that the plaintiff claimed the relief above mentioned.

The defendant in her points of defence said (inter alia), that the plaintiff in entering into the replacement agreement of December, 1928, agreed that the necklace was lost within the meaning of the policy, or that he made the agreement upon the footing that the circumstances constituted a loss within the policy; that the plaintiff made the agreement with full knowledge of all the facts; that the necklace was in fact lost, or lost within the meaning of the policy, and the defendant would object that the plaintiff was estopped from denying that the necklace was lost or lost within the meaning of the policy; and that the defendant denied that the plaintiff was entitled to rescind the agreement, and said that in purporting so to do the plaintiff committed a breach of the agreement; and the defendant counterclaimed for a sum equal to the difference between the value of the articles of jewellery which she had received and the insured value of the necklace.

Evidence was given on behalf of the plaintiff with a view to showing that the search that had been made for the necklace was not so thorough as it should have been, and that the replacement agreement had been induced by unintentional misrepresentations by the defendant as to the thoroughness of the search and by mistake as to the search for and loss of the necklace. Evidence was given by and on behalf of the defendant which went to show that a thorough search had been made for the necklace and that there had been no misrepresentation on her part.

*Sir Albion Richardson K.C.* and *Harold Murphy* for the plaintiff.

The defendant has no defence either under the replacement agreement or under the policy of insurance to the plaintiff's claim.

The replacement agreement should be rescinded and the articles delivered under it returned to the plaintiff. That agreement was entered into by the parties under a common mistake that there had been a loss of the necklace within the meaning of the policy, when there had been no such loss. The word "loss" in such a policy as this means permanent deprivation: see *Moore* v. *Evans* (1), and here there was no loss of the necklace in that sense but only a mislaying of it. The agreement having been induced by that common mistake of fact, the articles delivered under it by the underwriters to the defendant must be returned by her to them: *Kelly* v. *Solari* (2); and Welford on Accident Insurance, p. 242. Further, the replacement agreement was induced by an innocent misrepresentation by the defendant that a thorough search had been made for the necklace, such a search not having in fact been made, and on that ground also the agreement should be set aside. Moreover, there was an implied condition in the replacement agreement that if the necklace should be recovered that agreement should be avoided; and consequently when the necklace was recovered the agreement became void and the defendant became liable to return the articles which she had received under it: *McEntire and Another* v. *Sun Fire Office.* (3) The replacement agreement was only an adjustment, and an adjustment is not binding on an underwriter if at the time of signing it he does not know of some circumstance which would discharge him from liability under the policy: *Shepherd* v. *Chewter* (4); Arnould on Marine Insurance, 11th ed., sect. 1243.

Apart from the replacement agreement the defendant has no defence to the plaintiff's claim. She has no rights against the plaintiff under the policy of insurance. There

(1) [1917] 1 K. B. 458.
(2) (1841) 9 M. & W. 54.
(3) (1895) 29 I. L. T. 103.
(4) (1808) 1 Camp. 274.

was no "loss" of the necklace within the meaning of the policy, as appears from the authorities already cited, and the defendant is not therefore entitled to any indemnity or compensation from the plaintiff under the policy. Further, the policy contains no replacement clause, and, therefore, even if there had been a loss of the necklace the defendant would be entitled under the policy to compensation in money only and not in goods. In any case she ought therefore to return to the underwriters the articles which she received from them.

*H. D. Samuels* for the defendant. The plaintiff is not entitled to any of the relief which he claims. The replacement agreement is not invalid on any of the grounds stated, and the claim for its rescission is not well founded. There was consideration moving from the defendant to support that agreement, inasmuch as it gave the underwriters a right, which they did not possess under the policy, of replacing the necklace by other articles instead of by money. The agreement was not entered into under a common mistake. The parties in treating the necklace as lost did not make any mistake. There was in fact a loss of the necklace at the time when the agreement was made: see *Millen* v. *Brasch.* (1) The agreement was not induced by any misrepresentation on the part of the defendant as to the thoroughness of the search that had been made for the necklace. She informed the agent of the underwriters of the search which she had made and carried out his suggestions as to a further search, and he was satisfied with what had been done. The plaintiff in para. 2 of his points of claim admits that, if a thorough search had been made for the necklace, the replacement agreement was valid. Even if the replacement agreement be in the nature of an adjustment it is binding, as the underwriters have performed it in part by delivering certain articles under it. An agreement for settlement between underwriter and assured cannot be reopened where payment has been made: *Da Costa* v. *Firth.* (2) Where an insurer has paid money as for a total loss, and the property insured is afterwards restored, the

(1) (1882) 10 Q. B. D. 142, 147, 148.

(2) 4 Burr. 1966.

insurer cannot compel the insured to refund the money and to take the restored property instead of it: per Mansfield C.J. in *Hamilton* v. *Mendes* (1), quoted with approval in *Ruys* v. *Royal Exchange Assurance Corporation.* (2) If the policy had contained a provision giving the underwriters an option to make good a loss by supplying other articles instead of by paying money, they would have been bound by an election to exercise that option; and all the more are they bound by a replacement agreement specially entered into independently of the policy. If the replacement agreement is valid, the defendant is entitled not only to retain the articles which she has already received, but to receive other articles until the value of all the articles received is equal to the insured value of the necklace, the underwriters taking the necklace as salvage.

*Cur. adv. vult.*

May 12. ROCHE J. This action was heard before me in the Commercial List, and at the conclusion of the argument I reserved my decision. The action was in somewhat unusual form and raised questions of interest though not, in my opinion, of real difficulty.

The plaintiff in the action was an underwriter of an insurance policy, and he claimed a declaration that no loss under the policy had happened and certain consequential relief. The defendant, a married woman, was the assured, and her case shortly was that the underwriters had settled for a loss that in fact had happened, and that, in any event, there were no grounds justifying the reopening of a settlement of a loss which had been made.

The facts I find to be as follows. [His Lordship stated the facts substantially as above set out, observing in regard to the policy that the term "wheresoever" in that document might mean "whatsoever," or might be a compendious though not a very grammatical way of saying "wheresoever the assured may sustain the loss"; and continued as follows:] The question is whether or not the underwriters are entitled to reopen the settlement or arrangement for replacement of

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(1) (1761) 2 Burr. 1198.

(2) [1897] 2 Q. B. 135, 138.

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the necklace, which was made in December, 1928. The points of claim contain the following allegations: [His Lordship read paras. 2, 3 and 7 of the points of claim, and continued :] It is to be observed that para. 3 pleads the arrangement for replacement as an agreement. That pleading is in accordance with the fact. It was a binding agreement outside of the policy and one of obvious pecuniary advantage to the underwriters and to the jeweller who introduced the insurance and dealt with the replacement.

The plaintiff's contentions were formulated in the following manner, as reported quite admirably in The Times newspaper: "(1.) There was no loss within the policy, and the replacement articles were supplied under a mistake of fact; (2.) the agreement to replace was induced by a representation which was in fact untrue—namely, that the defendant had made a thorough search of her wardrobe; and (3.) it was an implied term of the agreement to replace that, if the insured object should be recovered before replacement was completed, the replacement agreement must be void and the articles supplied under it must be returned." There was, of course, no suggestion that the representations relied upon were other than innocent and honest.

These contentions of the underwriters are, in my judgment, not well founded either in fact or in law. My reasons for this judgment are as follows: As regards the facts, I have already, in my narrative of the facts, stated various things which were matters of controversy, but as to which I have intended that my narrative should represent my findings as to the facts. Beyond that my findings are as follows: I am satisfied, and hold, that the defendant, Mrs. Payne, made a thorough search, that is to say, she had made all such search as occurred to her to make at a time when she was certainly extremely anxious to find what she had lost. It has to be remembered that she had not any reason to connect the cloak in question with the loss any more than any other of her articles of apparel, or to suppose that she was wearing that cloak at the time the loss occurred. She had more than one evening cloak. It is said that she ought to have searched the cloak and all her clothes by feeling in all possible parts and places of her garments. But I feel quite unable to come to the conclusion that Mrs. Payne in her search fell below the standard of a reasonably diligent woman, or that the search which is now suggested, but which was not amongst Mr. Summers' suggestions at the time, would have then revealed what the shaking and wearing of the cloak failed to reveal. I further find that there was no such mistake as was alleged, and that Mr. Summers was not induced to enter into the agreement by reason of the representations of Mrs. Payne. Mr. Summers, a very experienced gentleman, was engaged in an investigation and formed his own conclusions on all the facts and not exclusively or mainly on what he was told by Mrs. Payne. The agreement was made because, on all the evidence and his experience, Mr. Summers arrived at the conclusion that the thing insured was lost and that it was to his principals' interest to make such an agreement as was made. Neither was there the alleged mistake nor any mistake sufficient to invalidate the agreement. Both Mrs. Payne and Mr. Summers thought that in all probability the loss occurred outside the house, but the inference was not very certain nor was it the basis of the agreement.

As to the law, no authority was cited to me which justified the rescission or reopening of the settlement made between the underwriters and the assured. It was said that an adjustment could be reopened: see Arnould on Marine Insurance, sect. 1242 and following sections, and cases cited thereunder; but an adjustment, apart from payment or actual settlement, is an admission and no more, and is subject to the same correction as any other admission. The case is, however, different where payment has been made: see *Da Costa* v. *Firth* (1), and I see no distinction between payment and replacement. In my opinion, the fact that the replacement, though agreed to, had not been completely effected can make no difference in the circumstances of this case.

(1) 4 Burr. 1966.

These grounds are sufficient to dispose of the action, and it is unnecessary in my view to decide whether there was in November and December, 1928, and down to February 27, 1929, a loss of the necklace. I should not be inclined nor, I think, entitled to make any declaration that there was no loss when, in my judgment, the underwriters are not entitled to any consequential relief by way of a reopening or rescission of the settlement. I desire, however, to avoid the impression that in my view the contention that there was no loss is well founded. It was at one time contended that a thing cannot be lost when it is in the owner's house. The contention is not supported by experience. It would be as unwise, as it is unnecessary, that I should attempt a definition of the word " loss " under a policy such as this. Losses are of many kinds and happen under diverse circumstances: see Bankes L.J. in *Moore* v. *Evans*. (1) The Marine Insurance Act has now defined losses for the purposes of marine insurance and, in the view of the Court of Appeal, in so doing has made some change from the common law rule: see *Polurrian Steamship Co.* v. *Young* (2), unlikelihood of recovery being substituted for uncertainty as to recovery as the test. Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters the main consideration on the question of loss. In this connection it is, of course, true that a thing may be mislaid and yet not lost, but, in my opinion, if a thing has been mislaid and is missing or has disappeared and a reasonable time has elapsed to allow of diligent search and of recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain and, I should say, unlikely.

In this case, in the view of the underwriters' representative as well as of the assured, a reasonable time elapsed before they settled and, as I have already found, diligent search was made and was fruitless. Subsequent discovery or recovery of the thing assured is, of course, of itself no disproof of the loss. On the contrary, the rule in a case such

(1) [1917] 1 K. B. 458, 471.

(2) [1915] 1 K. B. 922, 927.

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as the present is, in my judgment, the same as in the somewhat analogous case of capture: see the cases cited in the exhaustive judgment of Kennedy L.J. in *Polurrian Steamship Co.* v. *Young* (1), and in a judgment of my own in *Roura & Forgas* v. *Townend.* (2)

It follows that I am unable to find any good reason for the implication in the agreement of settlement of the term which it was contended for the plaintiff should be implied therein. As to the counterclaim, the defendant is entitled under that agreement to the difference between the value of the articles of jewellery which she has received and the value of the necklace either in the form of further articles or of money, as may be arranged between her and the underwriters, and it is not therefore necessary to make an order in her favour for that amount. There will therefore be judgment for the defendant on the claim with costs and no order on the counterclaim.

Solicitors for plaintiff: *Oswald Hickson, Collier & Co.*
Solicitors for defendant: *Andrew, Wood, Purves & Sutton.*

(1) [1915] 1 K. B. 922, 927. (2) [1919] 1 K. B. 189.

J. R.

*Applied.* CHAMPANHAC & CO., LTD. *v.* WALLER & CO., LTD. [1948] 2 All E.R. 724.

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*March* 20, 21;
*April* 11.

# ROBERT A. MUNRO AND COMPANY, LIMITED *v.* MEYER.

[1929. R. 2467.]

*Sale of Goods—Delivery by Instalments—"Each delivery or shipment shall be treated as a separate contract"—"The goods to be taken with all faults and defects . . . . at valuation to be arranged"—Delivery of some Instalments—Request by Buyer for Cancellation of Contract as regards Balance of Instalments—Agreement by Buyer to pay Sum of Money for Cancellation—Subsequent Discovery by Buyer that Goods delivered did not answer Contract Description and might have been rejected—Ignorance of Seller as to Defect in Quality—Validity of Agreement by Buyer for Cancellation of Contract—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 13, 31, *sub-s.* 2.

A contract for the sale of about 1500 tons of meat and bone meal provided that the meal was to be of a certain specified quality, and that it was to be shipped 125 tons monthly during 1928 in equal weekly quantities. The contract also provided that "each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments." "The goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration." The sellers made several deliveries under the contract amounting to nearly half the contract amount which the buyer accepted, but eventually the buyer requested the sellers to cancel the delivery of 782 tons then due for delivery under the contract, which the sellers consented to do on the buyer agreeing to pay 782*l.* by four instalments on specified dates. The buyer paid two instalments under the agreement, and then discovered that all the meal that had been delivered to him under the contract had been adulterated and was not of the contract description, so that the deliveries might have been rejected by him. He thereupon refused to pay any further instalments under the agreement. The sellers, who were blameless with regard to the adulteration and had delivered the meal in good faith, thereupon brought this action to recover the balance of the 782*l.* due under the agreement. The buyer by his defence alleged that the agreement was made under a mutual mistake of fact in that both the sellers and the buyer contracted in the belief that the goods supplied by the sellers were in accordance with the contract, whereas the meal was not in accordance with the contract, and he counterclaimed for rescission of the agreement and for the return of the money paid under it and also for damages for the breach of contract:—

*Held,* that the various deliveries of meal which had been made by the sellers before the date of the agreement did not, by reason of the adulteration, answer the contract description and therefore might

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have been rejected by the buyer if the defects had been discovered in time, notwithstanding the clause in the contract: "the goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged . . . . ," because that clause applied only to goods which answered the trade description, and did not shut out the overriding warranty in s. 13 of the Sale of Goods Act, 1893, that in a sale of goods by description there is an implied condition that the goods shall correspond with the description. Further, that the clause in the contract that "Each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" could not be construed so as to defeat the rights of the buyer under s. 31, sub-s. 2, of the Sale of Goods Act, 1893, to treat the breach of contract by the sellers as a repudiation of the whole contract; notwithstanding that the sellers had no knowledge of the defects and had no intention to deliver defective articles, inasmuch as the intention of a seller must be judged from his acts. But although the buyer, ~~if he had at the date~~ of the agreement for cancellation ascertained all the facts relating to the past deliveries, might have been entitled to treat the contract as having been repudiated by the sellers, yet as it was in the circumstances doubtful whether he would have so elected, the defence that the agreement had been entered into under such a mutual mistake as would justify a rescission of the agreement failed, even apart from any question of restitutio in integrum. The buyer, however, was entitled to damages in respect of the defective quality of the meal that had been delivered, and to a declaration that, in view of the defective quality of the meal, he was not bound to take delivery of the meal that was undelivered.

ACTION tried before Wright J. in the Commercial Court.

By a contract dated August 26, 1927, made between the plaintiffs, who were merchants dealing in cattle foods carrying on business in London, and the defendant, who was a merchant in cattle foods carrying on business in Hamburg, the plaintiffs agreed to sell and the defendant agreed to buy about 1500 tons of meat and bone meal at 13*l*. 14*s*. per ton c.i.f. Hamburg. The meal was designated in the contract as being the Smithfield Animal Products Company's production. It was to have a guaranteed analysis of albuminoids 40–45 per cent., oil and/or fat 10–12 per cent., phosphates about 30 per cent.

The contract contained the following clauses:—

Shipment: 125 tons monthly, January–December, 1928, to be shipped in about equal weekly quantities.

"Each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments."

"The goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration."

There was also a general arbitration clause.

The plaintiffs had previously made an agreement dated June 15, 1927, with the Smithfield Animal Products Company for the supply by the Smithfield Company of 1800 tons of meat and bone meal described in identical terms with those in the contract with the defendant.

The plaintiffs proceeded to make deliveries under the contract which the defendant accepted. But in April, 1928, owing to financial difficulties in Germany affecting farmers, who were in consequence unable to buy the meal, which was used as a cattle food, the defendant made an arrangement with the plaintiffs by which the delivery of certain quantities of the meal was postponed and the plaintiffs agreed to store up to 400 tons upon certain terms, one of which was that the defendant should pay 1*l.* per ton to the plaintiffs on shipment, which payment would be placed to the credit of the defendant's account.

In June, 1928, the defendant, owing to the financial difficulties still continuing, asked the plaintiffs to cancel the contract as regards 782 tons of meal which was still due for delivery under the contract. The plaintiffs agreed to cancel the contract as regards the 782 tons provided they were paid an indemnity of 1*l.* per ton, payment to be made quarterly on August 1, 1928, November 1, 1928, February 1, 1929, and May 1, 1929. The defendant paid 195*l.* 10*s.* on August 1, 1928, and 200*l.* on January 17, 1929, which left 386*l.* 10*s.* payable under the agreement.

The plaintiffs, after cancelling the contract with the defendant as regards the 782 tons of meal which had not been delivered under the contract, arranged with the Smithfield Company for the cancellation of a considerable part of the undelivered quantity upon payment to the Smithfield Company of the sum of 500*l.*

In March, 1929, owing to the condition of a certain parcel of 20 tons when delivered, it was analysed, and subsequently samples of all the deliveries of the meal were analysed, and it was then discovered that all the meal had been adulterated by an admixture of cocoa husks, the average amount of adulteration being 3·66 per cent. The plaintiffs, however, knew nothing about the adulteration and were quite blameless in the matter, the adulteration having been committed by the manufacturers of the meal. The defendant having discovered the character of the various deliveries which he had taken, said he was not bound by the agreement of June, 1928, and refused to make any further payments thereunder.

The plaintiffs thereupon brought this action to recover the sum of 386*l.* 10*s.*, the amount of the two unpaid instalments under the agreement of June, 1928.

The defendant in his defence alleged that the plaintiffs had broken the warranties in s. 14 of the Sale of Goods Act, 1893, because they knew that he was buying the meal for the purpose of reselling it as cattle food, whereas it was not fit for that purpose and was not of merchantable quality. He admitted making the agreement to pay 782*l.* to the plaintiffs, but said in para. 7 that " the agreement was made by the plaintiffs and by the defendant under a mutual mistake of fact, in that the plaintiffs and the defendant contracted in the belief that the goods being supplied by the plaintiffs to the defendant were goods which were in accordance with the contract, and that the said 782 tons which the plaintiffs had in readiness to deliver were goods which were in accordance with the contract which the defendant would be bound to accept," whereas in fact the meal was adulterated and was not in accordance with the contract.

The defendant counterclaimed (i.) for the difference between the value of the meal which had been actually delivered to him and the value which it would have had if it had been in accordance with the contract ; (ii.) for rescission of the agreement now sued on and a declaration that he was not bound to accept delivery of the 782 tons or make any further payment relating to them ; and (iii.) for return of the

195*l.* 10*s.* and 200*l.* which he had paid to the plaintiffs under the agreement of June, 1928.

Wright J. ruled that the onus of proof was on the defendant.

*James Dickinson K.C.* and *J. W. Morris* for the defendant. The defendant did not know at the time the various deliveries of the meal took place that the meal was adulterated with the cocoa husks; if he had known that the meal was adulterated he could have rejected the deliveries and have repudiated the contract, and now that the true facts have become known the defendant is entitled to repudiate the contract. Bigham J. in *Millars' Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* said (1): " It is argued that it violates the well-known rule of law that where goods are sold to be delivered in different instalments a breach by one party in connexion with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But I do not agree. The rule, which is a very good one, is, like most rules, subject to qualification. Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded ": see also *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) and *Taylor* v. *Oakes Roncoroni & Co.* (3) The fact that the defendant was able to sell the meal to buyers who took it without complaint is immaterial: *Slater* v. *Hoyle & Smith, Ld.* (4) The agreement, upon which the plaintiffs are suing, of June, 1928, for payment by the defendant of 782*l.* by instalments for cancellation by the plaintiffs of the contract as regards the delivery of 782 tons of meal, was entered into by both parties under a mutual mistake, as neither party knew at the time they entered into the agreement the defective condition of the meal. The defendant would never have entered into the agreement to pay 782*l.* in order that he might be released from his contract to take the 782 tons of

(1) (1908) 14 Com. Cas. 25, 29.
(2) (1884) 9 App. Cas. 434.
(3) (1922) 27 Com. Cas. 261.
(4) [1920] 2 K. B. 11.

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meal that were undelivered, if he had known that he could have rejected the goods owing to their bad quality. The agreement is therefore not binding. The principle is that where persons have contracted on the basis of an assumed state of facts, that contract will not be enforced if the assumed state of facts is not the real state of facts. In *Bingham* v. *Bingham* (1) an agreement was made by the plaintiff to purchase an estate from the defendant. On a bill to have the purchase money refunded, as it appeared to have been the plaintiff's estate, the Court made a decree in favour of the plaintiff, for though no fraud appeared, yet there was a plain mistake such as the Court was warranted to relieve against. In *Cooper* v. *Phibbs* (2) an agreement was made by the plaintiff to buy a fishery which in fact was his own property, and the House of Lords held that the agreement having been made in mutual mistake the plaintiff, though there was no fraud, was entitled to have it set aside. Lord Westbury said (3): "It is said, 'Ignorantia juris haud excusat'; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." In the present case there was a mutual belief that the contract was an enforceable contract. If the defendant had known that he had a right to rescind he most certainly would have exercised it. The fact that the contract has been partly performed will not prevent the defendant from exercising his right to rescind the contract on ascertaining the true facts. In *Compagnie Française des Chemins de Fer Paris-Orléans* v. *Leeston Shipping Co.* (4) the plaintiffs had been induced to enter into a contract by a material representation which was untrue, although not fraudulent, and Roche J. held that the plaintiffs could claim to rescind as soon as they knew the facts notwithstanding that the contract had been partly performed. In *Redgrave* v. *Hurd* (1) the purchaser of a house and solicitor's practice had entered into possession of the house and had begun to carry on the practice before he discovered that the practice was of less value than it had been represented to him to be worth, and it was held that notwithstanding the part performance the purchaser was entitled to obtain rescission of his contract and repayment of his deposit. In *Adam* v. *Newbigging* (2) also Newbigging obtained rescission of a contract of partnership and repayment of his capital notwithstanding that he had acted for some time as partner under the partnership agreement. "Restitutio in integrum" does not mean putting the parties back in the same position as they were in before; it means putting the parties in as good a position as they were in before. Further you only look at the position as between the two parties, and not whether they have altered their position as regards third parties.

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(1) (1748) 1 Ves. Sen. 126.

(2) (1867) L. R. 2 H. L. 149.

(3) L. R. 2 H. L. 170.

(4) (1919) 36 Times L. R. 68; 1 Ll. L. Rep. 235.

[*Kennedy* v. *Panama, etc., Mail Co.* (3) was also cited.]

*Le Quesne K.C.* and *G. R. Mitchison* for the plaintiffs. With regard to damages it is clear from *Slater* v. *Hoyle & Smith, Ld.* (4), that if goods are delivered damaged the buyer's loss is the difference between the market value of sound goods and the market value of the damaged goods. The difference between the two market prices should be the measure of his damages. Sub-contracts do not come into account, because the buyer is not bound to deliver the damaged goods under a sub-contract, and if the buyer does deliver the damaged goods under the sub-contract and has to pay damages to his sub-buyer those damages will not be the measure of his damages against the original vendor as they are res inter alios acta. When the plaintiffs and the defendant entered into the agreement in June, 1928, they did so in the belief that they were dealing with a binding contract, and that

(1) (1881) 20 Ch. D. 1.
(2) (1888) 13 App. Cas. 308.
(3) (1867) L. R. 2 Q. B. 580.
(4) [1920] 2 K. B. 11, 22.

the meal which had been delivered was in accordance with the quality required by the contract. But even if the defendant had known in June, 1928, when he entered into the agreement, that all the deliveries of the meal which had been made up to that date were defective in quality, nevertheless he would not have been entitled to refuse to accept further deliveries under the contract, by reason of the clause in the contract that "each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments." In *Higgin* v. *Pumpherston Oil Co.* (1) a contract for the purchase of 20 tons paraffin wax to be delivered during the next twelve months in about equal monthly quantities, contained the clause "each delivery shall constitute a separate contract." The sellers failed to make delivery for several months, and the buyer made no complaint until a date when he demanded delivery of the balance of the contract amount. The Court held that the effect of the clause "each delivery shall constitute a separate contract" was that if the vendor refused to deliver a monthly quantity the buyer's duty was to go into the market and buy as against that breach, and that that was his duty throughout the whole twelve months, and therefore the buyer's claim failed: see also Benjamin on Sale, 6th ed., pp. 793, 822. The defendant was bound to wait until each separate delivery was tendered, and if not in accordance with the contract he could obtain damages in respect of it, but he could not treat a wrongful delivery as enabling him to repudiate the contract. Lord Coleridge C.J. said in *Freeth* v. *Burr* (2): "The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. . . . The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the

(1) (1893) 20 R. 532.

(2) (1874) L. R. 9 C. P. 208, 213.

contract or a refusal to perform it on the part of the person so making default." That test was approved by the Court of Appeal in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) In *Taylor* v. *Oakes Roncoroni & Co.* (2) Greer J. held that the plaintiffs' breach of contract in respect of the instalments delivered and accepted under the contract was not a repudiation of the whole contract, but was a severable breach giving a right to the defendants to claim compensation, but not a right to treat the whole contract as repudiated.

[WRIGHT J. The difficulty in this case is that the plaintiffs were quite innocent and had no intention of delivering anything but meal in compliance with the contract. But can the position of the plaintiffs be distinguished from that of the Smithfield Company which supplied them with the meal ?]

The plaintiffs' position is distinguishable from that of the company who manufactured the meal and supplied the plaintiffs. Lord Sumner said in *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.* (3) : " I do not see how the fact, that the buyers have wrongly said ' we treat this contract as being at an end, owing to your unreasonable delay in the performance of it,' obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether." It cannot be said that the plaintiffs were in June, 1928, wholly and finally disabled from doing their part in performing the contract. The onus of proving that the plaintiffs were unable to perform their part of the contract is on the defendant, and he has failed to prove it. With regard to the agreement of June, 1928, being entered into by both parties under a mutual mistake. Lord Westbury did not say in *Cooper* v. *Phibbs* (4) that an agreement must be set aside on the ground of mutual mistake. All that he said was that a contract was liable to be set aside on that ground. Assuming however that the agreement was liable to be set aside on the ground of mutual mistake, still the agreement cannot be set aside if the parties have acted on the agreement and altered their position. The plaintiffs, after making the agreement with the defendant of June, 1928, and relying on that agreement, made another agreement with the Smithfield Company for the cancellation of the contract in respect of part of the undelivered meal and paid the Smithfield Company 500*l.* under that agreement. The plaintiffs therefore acted on the agreement with the defendant and altered their position, and consequently the defendant is not entitled to have the agreement cancelled. It is immaterial whether or not the plaintiffs can recover any of that money from the Smithfield Company. *Holt* v. *Markham* (1) shows that where money is paid under a mistake the person paying the money cannot recover it back if the person to whom it is paid, after the lapse of time sufficient to enable the mistake to be rectified, has spent the money. It was held in *Kennedy* v. *Panama, etc., Mail Co.* (2) that an innocent misrepresentation is not a ground for rescission of a contract. In the present case there was no representation at all. Both parties were equally ignorant as to the character of the meal, and therefore there could be no implied representation, and consequently the present case can be distinguished on that ground from *Compagnie Française des Chemins de Fer Paris-Orléans* v. *Leeston Shipping Co.* (3), where there was a material representation. In all the facts of the case the mutual mistake does not justify rescission. The property in the 80 tons, part of the 100 tons, passed to the defendant when they were put into store: see Sale of Goods Act, 1893, s. 18, r. 5; s. 35, s. 11, sub-s. 1 (*c*). Greer J. expressed the opinion in *E. Hardy & Co.* (*London*) v. *Hillerns & Fowler* (4) that there could not be acceptance of part of the goods under a contract and a rejection of the balance. In the present case the defendant accepted 20 tons out of the 100 tons, and therefore he cannot claim to reject the remaining 80 tons. Further, the rejection in March, 1929, was too late.

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(1) (1882) 9 Q. B. D. 648.

(2) 27 Com. Cas. 261.

(3) [1923] A. C. 48, 72.

(4) L. R. 2 H. L. 149.

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(1) [1923] 1 K. B. 504, 514.

(2) L. R. 2 Q. B. 580.

(3) 1 Ll. L. Rep. 235.

(4) [1923] 1 K. B. 658, 666.

[*Wallis, Son & Wells* v. *Pratt & Haynes* (1); *Pinnock Brothers* v. *Lewis & Peat, Ld.* (2); and *Ballantine & Co.* v. *Cramp & Bosman* (3) were also cited.]

*J. Dickinson K.C.* in reply. The question whether a contract has been repudiated is judged by the acts of the parties, whether they evince an intention not to carry out the contract. In the present case the plaintiffs during a period of six months delivered adulterated meal, and they thereby evinced an intention not to carry out the contract, and therefore the case comes within the rule laid down by Bigham J. in *Millars' Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (4) With regard to the clause in the contract that each delivery is to be considered a separate contract, this contract ought rather to be considered to be one for delivery by instalments, as was held to be the case in *Ballantine & Co.* v. *Cramp & Bosman.* (3) Deliveries by instalments are dealt with in s. 31 of the Sale of Goods Act, 1893, which provides that in the case of defective deliveries of one or more instalments, it depends in each case upon the terms of the contract and the circumstances whether the breach of contract is a repudiation of the whole contract.

*Cur. adv. vult.*

April 11. WRIGHT J. The plaintiffs in this case are merchants dealing in cattle foods, carrying on business in London and Glasgow. The defendant is a merchant in similar material carrying on business in Hamburg. The matters in dispute arise out of a contract made between the plaintiffs and the defendant, dated August 26, 1927, for the purchase and sale of " about 1500 tons of meat and bone meal (Smithfield Animal Products Company's production) packed in new bags of 110 lbs. each gross. Guaranteed analysis: Albuminoids 40–45 per cent., oil and/or fat 10–12 per cent., phosphates about 30 per cent., at 13*l.* 14*s.* per ton of 2240 lbs. c.i.f. Hamburg. 125 tons monthly, January to December, 1928, to be shipped in about equal weekly quantities.

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(1) [1911] A. C. 394.

(2) [1923] 1 K. B. 690.

(3) (1923) 129 L. T. 502.

(4) 14 Com. Cas. 25, 29.

Nett cash against documents on presentation in Hamburg by London bankers' cheque. Each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments. . . . . The goods to be taken with all faults and defects ; damaged or inferior, if any, at valuation to be arranged mutually, or by arbitration." There is a general arbitration clause : "Any dispute arising under this contract shall be settled in London under the rules for the time being of the London Court of Arbitration."

The actual claim in this case is made on an agreement for the cancellation of that contract for sale. The plaintiffs before making the contract for sale had already made an earlier agreement, dated June 15, 1927, with Poynter and Tobias, the representatives of the Smithfield Company, for about 1800 tons of meat and bone meal, described for the purposes of this case in identical terms with those in the contract with the defendant at a price of 12*l.* 10*s.* ; delivery in approximate equal monthly quantities, January to December, 1928, inclusive. That contract also contained an arbitration clause for arbitration in London.

The plaintiffs proceeded to make deliveries, and these were accepted by the defendant from time to time ; but as the year 1928 went on the defendant was somewhat behindhand in taking his deliveries, because there had been financial difficulties in Germany affecting the farmers, who were unable to buy this meat and bone meal, which is a cattle food, and in Germany is very largely used for the feeding of pigs. Owing to those difficulties in June, 1928, some 780 tons of the meal were still due for delivery, even after an arrangement had been made in the previous April for the postponement of certain quantities. It will be convenient if I refer at once to that arrangement, which leads up to the agreement in June. There was a considerable correspondence, but eventually at an interview an arrangement for postponement was come to as to part of the contract, and is embodied in a letter of April 25, 1928, from the plaintiffs to the defendant, but which is signed both by the plaintiffs and by the defendant. It is in these terms: "With reference to conversation to-day, in view of the unfortunate market conditions at present prevailing in Germany, we have come to an arrangement to store up to 400 tons, you having agreed to pay expenses thereby incurred over c.i.f. Hamburg, such as into warehouse, rent, plus overdraft interest at the rate of 6 per cent. per annum from date of shipment until date of delivery. You will also pay 1*l.* per ton on shipment which we shall place to the credit of your account"—on shipment, because the price was only payable against documents—"We note that you find storage charges in Hamburg and Bremen cheaper than in London, and we shall ship to your instructions to either of these ports, where we shall store, receiving store warrants in our name. We shall instruct our bankers in Hamburg to deliver to you as required against payment . . . . The goods to be cleared from store by end of April, 1929, at latest." Those 400 tons I shall have to deal with at a later stage in connection with the counterclaim, but to summarize the position: 300 tons out of the 400 tons were shipped to Hamburg and were duly delivered and paid for by about the end of 1928, and that left 100 tons which were put in store in London, and which remained there until the beginning of 1929. The history of that I must consider later. So much for the position in April.

In June difficulties in taking delivery had not diminished, and the result was the agreement of June, 1928, on which the present claim is brought. That agreement is either contained in, or evidenced by certain letters; the first is June 13, 1928, and it says this: "The writer"—that is to say a Mr. Holley of the plaintiff company—"had a conversation in our London office on Monday the 11th inst. with Mr. Pintus"—a gentleman representing the defendant—"when he informed us you were willing to carry out your agreement with us dated 25th April, 1928, only provided we agreed to cancel the remaining quantity, about 782 tons, at an indemnity of 1*l.* per ton, payment of which to be made quarterly, as follows: 1st August, 1928; 1st November, 1928; 1st

February, 1929; 1st May, 1929. This is a very one-sided agreement in your favour, as the market price to-day in Hamburg cannot be stated to be more than 12*l.* per ton. We understand from Mr. Pintus that you are taking the market value as 12*l.* 10*s.*, and on that basis you are paying to him 1*l.* per ton, his contract being 13*l.* 10*s.* On equal treatment we ought to receive 1*l.* 4*s.* per ton." Then: "We have now received from Mr. Pintus your bankers' cheque in our favour for 400*l.*, this being 1*l.* per ton deposit against the 400 tons to be stored under agreement of 25th April, 1928. Of this quantity as you already know 100 tons are stored in London." Then he dealt with the remaining 300 tons and with payment. There was an acknowledgment by the plaintiffs on June 13 in these terms: "We acknowledge receipt of your two letters of the 12th inst., accompanied by bankers' cheque value 400*l.* from Mr. Martin Meyer, Hamburg, which we have accepted as a deposit under our agreement with him of April 25, 1928, and beg to confirm our acceptance of his proposal to cancel the remaining 782 tons meat and bone meal on contract of 26th August, 1927, at 1*l.* per ton, payable as stated in your letter." Then the writer went on: "We have written to our bankers to give delivery as required of the 400 tons at the rate of 12*l.* 14*s.* per ton, Mr. Meyer having of course to pay the charges incurred from c.i.f. up to the date of delivery. As stated by the writer at our interview we consider the arrangement a very one-sided one in favour of Mr. Meyer, but in order to assist him we have accepted in the making of this agreement a part of his loss for our own account." There was another letter of June 12 from Mr. Pintus to the plaintiffs pointing out that there were 1182 tons still to be taken, and after deducting 400 already shipped or about to be shipped to Hamburg, there were 782 tons still to be taken. The agreement was confirmed by a letter accepting it, which also contained these words: "All warehousing charges to be for Meyer's account"—that refers to the 400 tons—"and the goods in store at Hamburg to remain your property"—that is the plaintiffs' property—"until such time as deliveries are taken and payments are made against them." Under the agreement certain instalments were payable and were paid to the extent of the first two—namely, 195*l*. 10*s*. on or about August 1, and 200*l*. on or about January 17, 1929. That left payable under the agreement 386*l*. 10*s*., which was due for payment by instalments on February 1 and May 1, 1929. The present action is brought claiming these two instalments, which have not been paid.

I must now refer to events which took place between June, 1928, and March, 1929, when the dispute arose. As I have already said, 300 of the 400 tons were taken and paid for; the remaining 100 tons still remained in the warehouse in London. The parcel of 100 tons had been invoiced under two invoices of April, 1928, which stated that the goods were stored at Fisher's Wharf, in fact in the name of the plaintiffs. The invoices, which said "Delivery ex store as required," dealt in an anticipatory way with the 100 tons. In February, 1929, on the defendant's instructions, the plaintiffs shipped and invoiced to him out of the 100 tons 20 tons; the invoice, which was dated February 6, 1929, is for 20 tons of this meat and bone meal, according to the specification at 13*l*. 14*s*. per ton, that is, 274*l*. 9*s*. 9*d*., less 1*l*. per ton already paid, leaving 254*l*. 9*s*. 9*d*. To that was added the various charges for storage, rent and insurance, and interest, amounting to 28*l*. 5*s*. 6*d*., and the total invoice was 282*l*. 15*s*. 3*d*., "per steamship *Hermia* from London to Hamburg c.i.f. Hamburg, ex. 100 tons lot, stored London. Contract dated 26th August, 1927. Payment net cash against documents on presentation in Hamburg by London bankers' cheque." Those goods were duly delivered and paid for, but something in their appearance caused inquiries to be made. Up to that time the German farmers had taken the various deliveries from the defendant without any protest and without any claim to abate the price which was payable to him for the goods. The difficulty arose about this parcel. Its appearance was somewhat repellent, and it was eventually analysed, and was found, as a result of the analysis, to be adulterated to the extent of something like 5 per cent. with an entirely foreign substance—namely, cocoa husks. The cocoa husks could not, according to the evidence, have got into the meal by accident during the process of manufacture, but must have been put in deliberately by the manufacturers, the Smithfield Animal Products Company. Whereas the contract price of the meat and bone meal was 13*l*. 14*s*. a ton, the value of these cocoa husks was put at something like 2*l*. 10*s*. a ton. The result was that the article delivered cost much less to manufacture and, in my judgment, was not an article such as the contract between the plaintiffs and the defendant called for. It is true that the analysis of meat and bone meal answered the specification, but I think the article actually delivered was not within the contract description, because it was not meat and bone meal, but was a mixture of meat and bone meal and cocoa husks, an entirely alien substance in quantities which might vary from something in the nature of 3 per cent. to something in the nature of 5 per cent. That was a serious matter. By the law in force in Germany through the whole of 1928 it was a penal offence to deliver as meat and bone meal an adulterated substance containing such a proportion of alien matter. In England also it was a penal offence, at least from the middle of 1928, under the Fertilizers and Feeding Stuffs Act of 1926 (16 & 17 Geo. 5, c. 45). I am quite satisfied that this stuff—and I am now only dealing with the 20 ton lot—did not answer the contract description and might have been rejected, notwithstanding the clause of the contract, which provided: "The goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged mutually or by arbitration." That clause in my opinion only applies to goods which answer the trade description, and does not shut out the overriding warranty or condition implied by law under s. 13 of the Sale of Goods Act, which says that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. I think these goods as delivered to the plaintiffs did not correspond with the contract description, and equally as delivered by the plaintiffs to the defendant

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did not any more correspond with the contract description. The plaintiffs knew nothing about this, and so far as they were concerned were quite blameless, and were victimized in the transaction; but under the contract they were bound to deliver goods answering to the contract description. I need not refer to authority, because it has been frequently laid down that a seller cannot justify delivering goods which to a substantial extent are of the contract description, but are mixed with other goods which do not answer the contract description. In this case, when an examination was made of the samples which had been retained out of all the parcels dealt with between the plaintiffs and the defendant, it was found that taking an average of those samples the amount of adulteration, that is to say, the quantity of cocoa husks, amounted to no less than 3·66 per cent. in the average. That is a very substantial matter. Some of the deliveries showed a percentage of 5 per cent.; that means that whenever a delivery was made of a ton purporting to be meat and bone meal there were only 19 cwts. of meat and bone meal in it, and 1 cwt. of inferior substance; and the same applies with a slight abatement to the other cases where the quantity of cocoa husks was somewhat less. In my judgment the stuff delivered did not answer the description called for by the contract, and, therefore, might have been rejected. But up to the date when the sampling took place, which was about March, 1929, neither the plaintiffs nor the defendant had any suspicion that the goods dealt with were not what they purported to be and ought to have been; the whole thing was due to the conduct of the Smithfield Company, which had deliberately adulterated these deliveries.

The defendant having discovered as a result of these various analyses the character of the deliveries which he had taken, claimed that he was not bound by the agreement of June, 1928, on which this action is brought. In his defence he summarized the position which he had taken up as follows in para. 7: "The agreement was made by the plaintiffs and by the defendant under a mutual mistake of fact in that the plaintiffs and the defendant contracted in the belief that the goods being supplied by the plaintiffs to the defendant were goods which were in accordance with the contract, and that the said 782 tons which the plaintiffs had in readiness to deliver were goods which were in accordance with the contract which the defendant would be bound to accept." That is the mistake on which the defendant relies; and he counterclaims that the agreement ought to be set aside and rescinded ab initio and that he should have returned to him the moneys which he had paid under the agreement; and should be released from any obligation to make the two remaining payments. So far as the precise allegation in the points of defence is concerned the facts do not support it, because the plaintiffs had not got the 782 tons in readiness for delivery. On the contrary, as to a large part they were awaiting delivery in due course during the remainder of the year from the Smithfield Company under the contract to which I have referred, and therefore, so far as the letter of the pleading goes, the defence and counterclaim on this point must fail. I think, however, that I ought to consider the question from a larger point of view. The way in which the case is put by the defendant is that he would not have entered into that agreement to pay 782*l.* for cancelling the balance of the contract if he had known that the contract was not enforceable against him, and the reason on which he bases that contention is that if he had known the condition of the stuff delivered or appropriated up to June, 1928, he would have been entitled to treat the contract as repudiated for the future and to refuse to be bound thereby any more, or take further deliveries. It turns on his ignorance of the character in fact of the deliveries, but that in itself would be immaterial unless it carried with it the right to treat the contract as ended.

That raises several questions of some nicety and difficulty. The first question is whether the imperfect deliveries of the 611 tons justified the defendant in saying that he was no longer bound by the agreement, because it had been repudiated by the plaintiffs. The question turns upon s. 31 of the Sale of Goods Act, which deals with instalment deliveries.

Sub-s. 2 says: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated." There are two cases which throw some light upon this section; one is *Millars' Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1), where it was decided that an arbitrator was entitled to hold that the contract could be cancelled by the buyer, because one parcel out of the two provided for by the contract was not in accordance with the terms. In that case Bigham J. said (2): "If the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty." Walton J. agreed in that judgment. In the present case the whole 611 tons were of the adulterated character which I have described. It is true that the plaintiffs were unaware of the facts; on that an argument has been based that the seller can only be deemed to repudiate if he so intends in fact, so that s. 31 cannot be relied on as giving the buyer the right to treat the whole contract as repudiated where there is no

(1) 14 Com. Cas. 25.

(2) 14 Com. Cas. 29.

knowledge and no intention on the part of the seller to deliver defective articles. In cases like *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1), the question is put whether or not the seller or the party in default had an intention no longer to be bound by the contract. The question was thus stated in one case: Did he evince an intention no longer to be bound by the contract? No doubt the plaintiffs here had no intention to break the contract, but in my opinion in such a case as this, where there is a persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains in time what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character, and will not accept the position that he must always be watchful and analyse the goods that are delivered to see whether or not they answer to the contract. My conclusion is that in such circumstances the intention of the seller must be judged from his acts and from the deliveries which he in fact makes, and that being so, where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated.

Two further questions are raised; one is that if the trouble had been discovered while the contract was current and notice had been given to the Smithfield Company by the plaintiffs, the Smithfield Company would have mended their ways; and in support of this reference was made to the fact that though the plaintiffs refused to complete their contract with the Smithfield Company after March, when they discovered the trouble, they did in fact take a small delivery of twenty-four tons, which was found—the company having been warned—to be in accordance with the contract. The plaintiffs relied upon some expressions of Greer J. in *Taylor* v. *Oakes Roncoroni & Co.* (2), where the learned judge said (3): "No complaint had in fact been made, and non constat that if the defendants had asked for a better compliance with the contracts the plaintiffs might not have been able to improve their further deliveries so as to make them a strict compliance with the contracts. The defective deliveries, though they did not strictly comply with the contract description, were not far short of the quality required by that description." On that ground the learned judge refused to say that the contract had been repudiated and could be put an end to. But I think that is a different case from the present one; the breach of contract in this case is very substantial, and I think it would be a very large assumption to assume that it could have been put right or that there was any guarantee as to what would happen in the future. It must be remembered that the goods had to be obtained from the Smithfield Company, because they were the only people who manufactured goods which would be a compliance, as regards that part of the description, with the contract.

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(1) 9 App. Cas. 434.
(2) 27 Com. Cas. 261.
(3) 27 Com. Cas. 264.

The next contention of the plaintiffs is based upon the provision in the contract that "Each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments." That is a clause which is often found in contracts of this description and which is very difficult to construe, or at least to apply to all possible emergencies. It seems to me, however, that whatever effect it may have—and I am not going to attempt to exhaust the possibilities of this clause—it cannot be construed so as to defeat the rights of the buyer under s. 31 of the Sale of Goods Act. The matter can be tested by a very simple illustration. Suppose the seller in the middle of performing the contract said in terms that he would not in any circumstances make any further deliveries, would the buyer then be bound to wait until each delivery became due, and then, if and when it was not delivered, and then only, be entitled to bring his action? In my opinion this clause could not operate so as to prevent the buyer in such circumstances from bringing his action, if he were so minded, so soon as the complete and positive refusal to fulfil the contract was expressed; but the rule under s. 31, sub-s. 2, of the Sale of Goods Act is only a method of giving effect to the same principle as would arise in the case of a definite and express refusal; because the acts of the seller in such a case are treated as being equivalent to declaring that he will not fulfil the contract, that is, a refusal. It appears to me, therefore, that this clause, whatever it may mean, has nothing to say to the particular question at issue here.

But that is only one step in the argument which was put before me, because that only leads to this contention, that the defendant as buyer, if he had known all the facts in June, 1928, had the right of claiming to cancel the contract without any payment, and, if he had known that he was not bound by the contract, would not have agreed to pay 1*l.* a ton to cancel the remaining 782 tons, and hence under the doctrine of mistake the Court should declare the contract rescinded ab initio. The mistake as to the condition of the deliveries was mutual, and both parties must have been of opinion that the contract of sale was binding on them. There are certain cases in which at common law a mistake prevents a supposed contract from being any contract at all; there is the appearance of a contract, but the contract, as it is sometimes said, is void. Such a mistake is illustrated by s. 6 of the Sale of Goods Act, which deals with the case where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time the contract was made and the contract is void, that is to say, there is no contract, and any money paid under such a contract is simply money paid for a consideration that has failed, so that the money is recoverable. Such a case is *Couturier* v. *Hastie* (1); and to take another illustration, where the claim applied not to a chattel but to a chose in action, there is *Scott* v. *Coulson*. (2) In that case there was a contract for the sale and purchase of a policy of insurance on a life, but it was afterwards ascertained that the assured person had died; the Court of Appeal there held that the contract entered into between the parties rested upon the basis of the assured person being still alive; that basis not existing there was no contract. In these cases

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(1) (1856) 5 H. L. C. 673.

(2) [1903] 2 Ch. 249.

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it is clear that anything done under the belief that there is a contract is simply a nullity; moneys paid can be recovered, because no rights can possibly arise out of the mere appearance of a contract, there being in fact no contract. There are, however, certain other cases which are not so clear as those to which I have referred, in which a Court of equity has exercised jurisdiction to declare, on the ground of some material and vital mistake, that the contract is rescinded ab initio, but the Court has only exercised that equitable jurisdiction if satisfied not only that there was a mistake but also that the circumstances were such that the mistake could be undone, and ought to be undone, and that there might be a restitutio in integrum. Probably one of the most striking cases of that type is that of *Cooper* v. *Phibbs* (1), where the curious position was that the party made a contract to acquire a right of fishery and to pay for it, not knowing that he was in truth himself entitled to the fishery, and it was also there held that the application of the rule of the Court of equity was not limited to ignorance of a mere specific fact but would extend to ignorance of a matter of private right, that is to say not ignorance of the general law of the country which everybody is presumed to know, and about which nobody can be mistaken in law, but of a private right of ownership, which may be treated for this purpose as a matter of fact, though it is in a sense also a matter of law. Lord Westbury said (2): "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." In such a case there is no mistake of so precise and specific a character as the case in common law to which I have referred; there is an existing thing or chose in action which may be the subject of the contract, but the contract is liable to be set aside, because it was entered into by both parties on a misunderstanding such as Lord Westbury explained. Similarly in *Bingham* v. *Bingham* (3), where a man had made a contract

(1) L. R. 2 H. L. 149.

(2) L. R. 2 H. L. 170.

(3) 1 Ves. Sen. 126.

to purchase property of which he was owner, he went to the Court of equity, who held the contract should be rescinded. In the present case, however, it seems to me that I should not be justified in saying that this contract can be set aside. No doubt, if I am right in the conclusion I have expressed, the defendant, if he had been so minded and had ascertained all the facts relating to the past deliveries, would have had the right to elect to treat the contract as at an end, but it is not at all clear that he would have taken that course. The questions of law involved were difficult and doubtful; in particular the question whether in this case and under the terms of this contract there was that right under s. 31; in addition what decision would have been given if the matter had gone to arbitration under the contract may, perhaps, be even more doubtful than if the matter had gone to a decision in law. There is also the clause of the contract as to the separate deliveries, which adds further confusion. In all the circumstances I do not think I am justified in finding as a fact that the defendant would have elected to risk an arbitration and to claim that this contract was rescinded. I think it is practically certain that he would have attempted to compromise the matter by seeking a release on terms of compensation, and the actual compromise would have been not very, if at all, different from the terms of the agreement actually arrived at, because the agreement, as is pointed out in the letters, was very favourable to the defendant. I think there is no precedent for setting aside a contract in such circumstances, because I am unable to find that the making of the contract was conditioned by the mistake. I further think that even if there was such a mistake here as to induce the Court otherwise to rescind the contract, the Court would still have to consider if it could restore the parties to their original position. I do not say that the restitutio in integrum, the possibility of which is essential to the jurisdiction of the Court of equity, means that the parties would be put in the same position as if they had never made the contract. In a sense that could never be done. I further think that it is impossible, by looking at the various cases in which this principle has been discussed, to ascertain any precise rules which limit definitely the application of it. The Courts of equity have always exercised a certain discretion, but the cases have mainly been cases of a comparatively simple character, cases of the delivery up of possession and the payment of money; payments of sums paid with compensation for occupation, if there has been occupation, of property, and possibly with an indemnity against liabilities incurred under the assumed contract—namely, the contract which is set aside; in these cases there has been a sufficient restoration of the position. But in the present case it is not merely a question of repaying certain money. Nor do I think it is right to say that regard ought not to be had in this connection to the action of the plaintiffs in settling, as they actually did with the Smithfield Company, and paying them the sum of 500*l.* for the cancellation of a considerable part of the undelivered quantity. I think that there was a course of conduct on the part of the plaintiffs which must be taken to have been within the contemplation of the defendant as a business man, because it was a natural thing for the plaintiffs when they had cancelled their contract with him to seek to cancel if they could, and as far as they could, their corresponding contract with the Smithfield Company. On the whole, therefore, I think that this defence fails, and the counterclaim on this matter also fails.

That, however, still leaves certain questions to be considered. The quantity delivered under the contract was 631 tons, and these deliveries were all, as I have found, deliveries which did not correspond to the contract description, and that being so the defendant in his counterclaim claims damages in respect of these 631 tons. To my mind he is entitled to those damages; the only question is, what is the measure of damage? That was very much debated in the evidence. Apparently the intrinsic difference in value between 20 cwt. of meat and bone meal and 19 cwt. of meat and bone meal, plus 1 cwt. of cocoa husks is something like 11*s.*, that is to say, taking 5 per cent. for convenience, as the amount of adulteration, there would be a difference in intrinsic value of that amount, and I have already given the figures on which that is based. But the question is what is the difference in value between the pure meat and bone meal and the adulterated article as marketable commodities? The cocoa husks apparently are not poisonous to pigs or cattle; they may have some little feeding value; but the trouble is that having regard to the Fertilizers and Feeding Stuffs Act of 1926, and even apart from the Act, no honest merchant would go to his customers, knowing the constitution of this stuff, and offer it as meat and bone meal. He would have to state its true composition, both in Germany and in this country, or he would be subject to penalties. But even as an honest trader, to put it no higher, he would have to say that he was tendering and offering for sale an adulterated article, and the evidence before me of very reliable and trustworthy witnesses is that that would affect the marketability of the article to a very large extent, and would make it very difficult to sell that article, so that it could only be sold, if at all, under the inducement of a very considerable reduction in price. I have had all sorts of estimates before me, and it seems to me on the whole that I ought to allow 3*l.* 5*s.* a ton on each ton actually delivered of the adulterated stuff. I reject the contention that the damage is limited to the intrinsic difference of 11*s.* I treat as immaterial the fact that the defendant's customers accepted the stuff without complaint.

That leaves only one more question in this very lengthy case, and that is the question with reference to the 80 tons which remained out of the 100 tons, because, as I pointed out, 20 tons of the 100 tons which had been stored in London under the agreement of 1928 had been delivered, leaving 80 tons still in store. As to that there is a counterclaim on the part of the defendant that he is not bound to take delivery of the 80 tons, or that if he is bound to take delivery he is entitled to damages, because they are of inferior quality. I have come to the conclusion that the defendant cannot be compelled to take those 80 tons, because in my judgment the property in them had not passed, and, if the property had not passed, then if they were tendered to him and he inspected them he would have found that they did not answer the contract description, as I have already explained, and that being so, for reasons which I have already given, he would be entitled to reject them. Mr. Le Quesne however argued that there had been an appropriation, so that the property had passed, though the sellers had a lien under s. 41 of the Sale of Goods Act. It is true that those 80 tons have been set aside in a warehouse and are in bags which bear the defendant's mark, and had been invoiced, as I have pointed out in April; but it seems to me that the terms of that invoice, which I have already read, show, when taken with the other circumstances of the case, that the seller was retaining the jus disponendi under s. 19, sub-s. 1, of the Sale of Goods Act, which provides that "where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled." The section goes on to deal with the specific case of goods shipped where the bill of lading is taken in the name of the seller. These particular goods, as the invoice shows, were stored in the name of the plaintiffs as sellers, and they were not to be delivered until they had been shipped c.i.f. Hamburg, and unless and until there had been payment of the invoice amount, less 1*l.* per ton. Therefore under the agreement to which I have already referred payment was to be made before the goods were transferred. I need not elaborate the point; in my opinion in the circumstances there was a jus disponendi reserved to the seller by the contract. It was expressly agreed that the goods stored in Hamburg were to remain the property of the sellers, and that applies a fortiori to that part of the 400 tons which was stored in London and which the plaintiffs under their contract when required had to ship to Hamburg. This confirms the view which I have formed from the whole of the transaction—namely, that the plaintiffs as sellers had reserved the jus disponendi. No property passed, and therefore the defendant is entitled to refuse to take delivery of those 80 tons, because they do not agree with the contract description.

A further point was made by Mr. Le Quesne—namely, that because delivery of 20 tons out of the 100 tons had been taken, bulk had been broken, and there was a notional acceptance of the whole of the 100 tons as an indivisible bulk. I see no foundation for that contention. The 100 tons were to be taken as required, the 20 tons were taken as a separate delivery, and further the defendant is entitled to rely on the clause of the contract as to each delivery or shipment being treated as a separate contract. I think that clause does apply to such a case as a separate delivery of that 20 tons, but in any case in my judgment there is no ground at all for treating this delivery and acceptance of 20 tons as a notional acceptance of the whole 100 tons. I think it was a delivery and acceptance of 20 tons, no more and no less, and left the remaining 80 tons still subject to the contract in all respects.

There is only one other thing that I ought to mention, and that is there is also a claim by the defendant for the return of 80*l.*, being 1*l.* a ton paid. I think that 80*l.* must be repaid by the plaintiffs to the defendant, because it is merely a deposit and a prepayment of 1*l.* per ton, being part of the contract price, and therefore it can be recovered, in my judgment, as a payment made in respect of which there has been a failure of consideration, because the defendant is now entitled to refuse to take the 80 tons. There must be judgment for the plaintiffs on the claim and part of the counterclaim, and for the defendant on part of the counterclaim.

*Judgment accordingly.*

Solicitors for plaintiffs: *Gasquet, Metcalfe & Walton.*
Solicitors for defendant: *Cosmo Cran & Co.*

R. F. S.

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*April* 11, 29;
*May* 16.

## KODAK, LIMITED *v.* ALPHA FILM CORPORATION, LIMITED.

[1930. K. 142.]

## FREDERICK HUTH AND COMPANY *v.* JACKSON.

[1930. F. 548.]

*Practice—Liquidated Claim—Specially indorsed Writ—Summons for Judgment—Conditional Leave to defend—Trial by Judge alone—Short Cause List—Rules of the Supreme Court, Order* xiv., *rr.* 6, 8; *Order* xxxvi., *r.* 6.

On a summons for leave to sign final judgment under Order xiv., r. 1, of the Rules of the Supreme Court the Court or a judge refusing the plaintiff leave is not bound to give the defendant unconditional leave to defend; but in allowing him to defend may under Order xiv., r. 6, impose the condition that the case shall be entered in the special list established by Order xiv., r. 8 (*b*), and, notwithstanding Order xxxvi., r. 6, may add the condition that the case shall be tried by a judge without a jury:—

So *held* by Greer and Slesser L.JJ.; Scrutton L.J. contra, being of opinion that, although on giving leave to defend an order may be made under r. 8 (*b*) of Order xiv. for entering an action in the special list, no condition either that this shall be done, or that the action shall be tried without a jury, can be imposed except under r. 6 of that Order, and then only when but for the condition the judge is prepared to give the plaintiff leave to sign judgment under r. 1.

## KODAK, LIMITED *v.* ALPHA FILM CORPORATION, LIMITED.

Appeal from an order of MacKinnon J. in chambers affirming an order of Master Moseley made under Order xiv., r. 6, of the Rules of the Supreme Court, that the defendants should be at liberty to defend the action on condition that the action should be entered in the short cause list for trial by a judge alone.

The plaintiffs brought the action for 802*l.* 10*s.* 2*d.* for goods sold and delivered on a writ specially indorsed under Order iii., r. 6, and took out a summons for leave to sign judgment under Order xiv., r. 1. The defendants in their affidavit in answer stated that the goods, negative and positive films, were not ordered by them but by or on behalf of one Geneen who was producing a film to be distributed for him by the defendants, and that any orders given by the defendants to the plaintiffs were given by them as agents for the said Geneen as the plaintiffs must have known, and that any payments made by the defendants were to the knowledge of the plaintiffs made on account of Geneen.

The plaintiffs in their affidavit in reply denied that they knew, and stated that it was not the fact, that the defendants were acting as agents for Geneen in ordering or paying for the goods. They also produced and verified a letter from the defendants ordering 20 rolls of negative film and 10 rolls of positive film to be sent to Geneen, stating that they understood that Geneen had ordered other films and requesting that the invoices for these goods should be sent to them. The letter also referred to another order which had been given by telephone by the defendants themselves.

The goods were ordered on various dates between January 2 and 9, 1930. The writ was issued on February 10, 1930. On the above facts the Master ordered that the defendants should be at liberty to defend the action on condition that it should be entered in the short cause for trial by a judge alone. (1) The defendants appealed and prayed that the action should be tried with a common jury. MacKinnon J., the judge in chambers, dismissed the appeal.

The defendants appealed.

*Fortune* for the appellants. The question raised by this appeal is whether the Master or judge in chambers who, on a summons for judgment under Order XIV., is not prepared to give the plaintiff leave to sign judgment, and must therefore give the defendant leave to defend, can nevertheless under r. 6 of that Order (2) restrict the leave by imposing the

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(1) This was in accordance with a form, No. 7 in Appendix K to the Rules of the Supreme Court. The form having been prescribed by the Masters was approved by the Lord Chancellor on July 5, 1929: see [1929] W. N., Pt. 2, 198.

(2) Rules of the Supreme Court, Order XIV., r. 6: "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit."

Order XIV., r. 8 (*a*): "Where leave, whether conditional or unconditional, is given to defend, the judge shall have power to give all such directions as to the further conduct

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conditions that the case shall be entered in the special list established by r. 8 (*b*) and tried without a jury. The plaintiff is entitled to have his case tried by a judge and jury except in the cases mentioned in rr. 3, 4, and 5 of Order XXXVI. (1) By r. 6 of that Order, in any other cause or matter "an order shall be made for a trial with a jury" upon the application of either party: *Jenkins* v. *Bushby.* (2) It is said that Order XIV., r. 6, warrants the order appealed from. By that rule leave to defend may be given unconditionally; that is, where in the opinion of the judge the plaintiff is not entitled to judgment. Or leave may be given subject to terms; but that must mean where the judge is of opinion on the evidence before him that the plaintiff is entitled to judgment. For why should a defendant be hampered in his defence where the plaintiff is not entitled to judgment? *Jacobs* v. *Booth's Distillery Co.* (3) It was never intended that Order XIV., r. 6, should override Order XXXVI., r. 6. If r. 6 of Order XIV. must on its construction be held to have that effect, it is ultra vires and void.

of the action as might be given on a summons for directions under Order XXX., and may order the action to be forthwith set down for trial.

(*b*): "A special list shall be kept for the trial of causes in which leave to defend has been given under this Order, and in which the judge is of opinion that a prolonged trial will not be requisite; and the judge may, if he thinks it advisable, order any such action to be put into such list."

(1) Order XXXVI., r. 3: "Causes or matters assigned by the Act to the Chancery Division shall be tried by a judge without a jury, unless the Court or a judge shall otherwise order."

Rule 4: "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which immediately before November 1, 1875, could, without any consent of parties, have been tried without a jury."

Rule 5: "The Court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury."

Rule 6: "In any cause, matter, or issue other than those mentioned in rules 3, 4 and 5 of this Order, upon the application (not later than ten days after the close of the pleadings or where there are no pleadings at the time of or within ten days after the making of the Order directing the mode of trial) of any party thereto for a trial with a jury of the cause, matter, or issue, an order shall be made for a trial with a jury."

(2) [1891] 1 Ch. 484.

(3) (1901) 85 L. T. 262.

*Du Parcq K.C.* and *A. A. Pereira* for the respondents. The reasoning of the appellants if applied impartially would render r. 6 of Order XIV. a nullity. If when the plaintiff is not entitled to judgment the defendant must have unconditional leave to defend, then logically, if the plaintiff is entitled to sign judgment, the defendant ought not to have leave conditional or unconditional to defend; there must be either unconditional leave for the defendant to defend or unconditional leave to the plaintiff to sign judgment, and there is no room for Order XIV., r. 6. But in truth that rule is not based upon strict logic but on practical convenience. The proceedings on a summons under Order XVI. are summary and to a great extent interlocutory, and the opinion which a Master or judge in chambers forms on the affidavits of the parties must often be less definite and determined than the judgment of a Court after full trial of an action. Therefore when after reading the affidavits the judge in chambers has little doubt, but in the nature of the proceedings cannot be quite sure, that the defendant has no defence, convenience suggests that he should allow the defendant to defend on condition that the case is tried in a particular manner. This view is borne out by the history of Order XIV., r. 6. Before the Common Law Procedure Act, 1854, a plaintiff in an action at common law was entitled to have his case heard by a jury: *Ford* v. *Blurton*. (1) That Act introduced one exception to the rule. The first substantial change was made by the Judicature Act, 1873, which contained in a Schedule a number of Rules of Court, one of which provided that in proceedings now regulated by Order III., r. 6, and Order XIV., r. 1, "permission to defend the action" might "be granted to the defendant on such terms and conditions, if any, as the Judge or Court may think just." Power was given by that Act to alter the rules in the Schedule, and they were altered from time to time. In 1875 the rule in question ran: "Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit." (2) In 1883 (3) it ran thus: "Leave

(1) (1922) 38 Times L. R. 801. (2) See W. N. (1875), Part 2, p. 348.

(3) See W.N. (1883), Part 2, Supplement, p. 8.

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to defend may be given unconditionally or subject to such terms as to giving security, or time or mode of trial (in cases which, under these rules, may be tried without a jury) (1) or otherwise, as the judge may think fit." In 1893 the words, which in the form of 1883 were enclosed in brackets, were omitted (2); with the result that the judge could prescribe the mode of trial not only in those cases which by the Rules might be tried without a jury, but in all others as well. The rule remained in this form until July, 1918, when the Juries Act, 1918 (8 & 9 Geo. 5, c. 23), was passed; but neither that Act nor the Administration of Justice Act, 1920, affect the present case because by the Administration of Justice Act, 1925 (15 & 16 Geo. 5, c. 28), the law as it stood before the Act of 1918 was restored, and so it remains at the present time. The practice of giving the defendant leave to defend on condition that the case is placed in the special list and tried without a jury is a common one, and although not based on any reported decision is recognized by dicta in this Court: *Wolfe* v. *De Braam* (3), followed in *Macartney* v. *Macartney* (4); *Kelsey* v. *Doune.* (5) *Jacobs* v. *Booth's Distillery Co.* (6) did not go the length of holding that conditional leave to defend can only be given in cases where the judge is of opinion that no real defence is disclosed.

*Fortune* in reply.

*Cur. adv. vult.*

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Appeal from an order of Macnaghten J. affirming an order of Master Ball made under Order XIV., r. 6, in so far as it allowed the defendant to defend the action on condition that it should be entered in the short cause list for trial by a judge alone. The defendant did not object to trial by a judge alone, but did object to the case being entered in the short cause list.

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(1) That is to say those cases now included in Order XXXVI., rr. 3, 4, and 5.

(2) See W. N. (1893), Part 2, p. 520.

(3) (1889) 81 L. T. 533.

(4) (1909) 25 Times L. R. 818.

(5) [1912] 2 K. B. 482.

(6) 85 L. T. 262.

The action was brought on a specially indorsed writ claiming 9676*l.* alleged to be due upon a guarantee in writing dated July 5, 1926, whereby the defendant undertook to repay to the plaintiffs when called upon 49 per cent. of all moneys advanced by them to a certain limited company. The plaintiffs alleged that they had advanced 19,747*l.* to the company and had on March 10, 1930, given the defendant notice to repay them the sum claimed. The plaintiffs took out a summons for leave to sign judgment. The defendant in an affidavit in answer stated that the agreement of July 5, 1926, was conditional upon the company, in which he held nearly half the shares, selling its property to a larger company, and that all advances to the selling company should be repaid out of the purchase money paid by the purchasing company, and that it was never contemplated that he should be liable except to the extent of his interest in the proceeds of the sale. He stated further that he did not know and had no means of knowing what advances, if any, had been made by the plaintiffs to the selling company.

The Master ordered that the defendant should be at liberty to defend the action on condition that the action should be entered in the short cause list for trial by a judge alone. On appeal Macnaghten J. ordered that each of the parties should make an affidavit of documents. In other respects he affirmed the order of the Master.

The defendant appealed.

*Phineas Quass* for the appellant.

*H. G. Robertson* for the respondents.

*Cur. adv. vult.*

May 16. The following written judgments were delivered:—

SCRUTTON L.J. These two appeals raise an important question of practice—namely, in what circumstances a form of order prescribed by the Masters of the Supreme Court on July 5, 1929, under the authority of Order LXI., r. 33, of the Rules of the Supreme Court, can appropriately be used. The form of order was designed to give effect to

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Order XIV., r. 6, and in the two cases before us has two important effects.

In *Kodak, Ld.* v. *Alpha Film Corporation*, an ordinary common law action for the price of goods sold, this form of order makes leave to defend conditional on the action being entered in the short cause list for trial by a judge alone, thus depriving the defendants of their right to a jury under Order XXXVI., r. 6.

In *Huth & Co.* v. *Jackson*, an action for money due under a guarantee, the form of order is the same. The defendant does not object to trial by a judge alone, but does object to being put in the short cause list which, he says, deprives him of time to look into the transactions in respect of which the guaranteed debt arises.

The important point in both cases is that counsel for the plaintiffs in each case admits, and the Court is of opinion, that the facts in his case would not entitle him to judgment under Order XIV. The question is whether, the plaintiff not being entitled to judgment under Order XIV., the defendant can nevertheless be restricted in his ordinary right to defend himself against the claim on the writ by being deprived of a jury or of the right to trial in the ordinary way.

Order XIV. is to enable a plaintiff to obtain an order for summary judgment, and, according to decisions of the House of Lords, is limited to cases where "it is clear that there is no real substantial question to be tried": *Codd* v. *Delap*. (1) To ascertain whether the case comes within the Order, the plaintiff, or some person who can swear positively to the facts, must verify the cause of action and the amount claimed and state that in his belief there is no defence to the action, and the judge may then enter judgment unless the defendant satisfies him that as a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend—it is not clear what is the difference between the two alternatives. The judge is not to try the action; he is to see that there is a bona fide allegation of a triable issue, which is not illusory; he need not be satisfied that the defence will succeed; it is enough that such a plausible defence is verified by affidavit. If the judge is satisfied of this, in my opinion the operation of Order XIV. is exhausted.

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(1) (1905) 92 L. T. 510.

The present question arises under r. 6 of Order XIV. This rule has been altered repeatedly. In 1875 it ran thus: "Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit." There were numerous early cases where under the rule the judge, though he declined to give the plaintiff judgment at once, yet required the defendant to bring money into Court, "to give security," as a condition of leave to defend. The decision of the House of Lords in *Jacobs* v. *Booth's Distillery Co.* (1) shows that this view was erroneous unless the judge was prepared to give the plaintiff judgment, but in mercy to the defendant allowed him to defend if the plaintiff was protected by having the amount claimed in Court. Lord James says in the case cited that the tribunal to which an application is made for leave to sign final judgment "ought to make the order only when it can say to the person who opposes the order 'You have no defence.'" The justice of this seems obvious; if the defendant has such a defence as that he should be given leave to defend, to refuse him leave unless he pays the amount claimed into Court may deprive a poor man of a real defence. The Court is not to determine whether the defence will succeed, but whether a bona fide defence, which may succeed, is raised; and the amount of money the defendant has cannot determine this. On the other hand if the judge thinks there is no real defence, the rule gives him power to protect the plaintiff by only allowing the defence to proceed if the amount claimed is secured, in which case mercy may be shown to the defendant in enabling him to try to prove a defence. In 1883, mode of trial was expressly included among the matters with respect to which a judge might impose conditions, but only "in cases which, under these rules, may be tried without a jury." In 1893 the limitation was omitted. I think the effect of this was

(1) 85 L. T. 262.

that in matters to which r. 6 applied, the defendant might be deprived of an ordinary trial, or of a jury, although he had otherwise a right to a jury under Order XXXVI., r. 6. But there remains the question whether r. 6 did apply, unless the judge was prepared to give judgment under Order XIV., r. 1; in other words whether in a case where the defendant was entitled to leave to defend, because the evidence did not establish a case for summary judgment, it was open to the judge to limit the defendant's right to defend himself. As regards security, in my opinion *Jacobs*' case (1) shows that the judge could not order security unless he was prepared and entitled in its absence to give judgment.

Until July, 1929, the form of judgment under Order XIV. (Form 2A) did not expressly make conditions, but terms were inserted as in an order for directions. In *Wolfe* v. *De Braam* (2) the judge and Master gave unconditional leave to defend, and the judge ordered the case to be put into the short cause list under r. 8 (*b*) of Order XIV. The defendant then applied for a jury under Order XXXVI., r. 6, but the application was refused. The Court of Appeal allowed an appeal from the refusal on the ground that the leave to defend given was unconditional and the order had not by way of condition or otherwise directed a trial without a jury, or deprived the defendant of his right to a jury under Order XXXVI., r. 6. But they expressed the opinion, which I think was not necessary for the decision, that the judge could by way of condition have made an order for trial without a jury. In *Macartney* v. *Macartney* (3) Pickford J., as he was bound to do, followed the decision in *Wolfe* v. *De Braam* (2) and, as he was not bound to do, expressed his agreement with the obiter dictum. I do not find that the attention of the Court was called to the distinction between cases where the plaintiff was not entitled to judgment under Order XIV. simpliciter and the cases where the plaintiff is so entitled but the defendant may obtain conditional relief. At the same time the obiter dicta of four distinguished judges

(1) 85 L. T. 262.

(2) 81 L. T. 533.

(3) 25 Times L. R. 818.

are entitled to the most careful consideration. But after considering the views of the House of Lords in the two cases cited, I have come to the conclusion that unless the judge is entitled to give judgment under Order XIV., r. 1, he is not entitled to fetter his leave to defend with conditions under r. 6. The plaintiff having failed in his application for judgment, how can the defendant be limited in his defence because the plaintiff is not entitled to summary judgment? This was suggested, in relation to the actual defences raised, by the Court of Appeal in *Langton* v. *Roberts* (1), where Davey L.J. doubted whether "the Master having given leave to defend could dictate to the defendant how he should restrict his defence." This result seems to me to follow from the decision of the House of Lords in *Jacobs* v. *Booth's Distillery Co.* (2)

It is said that this view makes Order XIV., r. 6, meaningless, for if the judge can give judgment under Order XIV. no condition as to security or trial are wanted. But in my view r. 6 is wanted and can be used to protect the defendant by giving him a right to trial if he will protect the plaintiff by security or a speedy trial; in other words it is only applicable when the plaintiff is entitled to judgment, but the judge thinks that he may in mercy to the defendant mitigate the strict rights of the plaintiff if he protects him in certain ways. Order XIV., r. 8, gives the judge, whether he gives unconditional or conditional leave to defend, power to put the case in a special list—that is the short cause list—if he is of opinion that a prolonged trial will not be necessary; but it does not, in my opinion, justify the judge in ordering under that rule trial by a judge alone where the defendant has a right under Order XXXVI., r. 6, to trial by a jury. If that is to be done it must be done under Order XIV., r. 6, and only in cases where the judge is entitled and prepared to enter judgment for the plaintiff. In other words the plaintiff must be entitled to judgment under Order XIV. before the judge under r. 8 of that Order can restrict the defendant's leave to defend.

(1) (1894) 10 Times L. R. 492.

(2) 85 L. T. 262.

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The result of these views on the two cases under appeal is as follows :—

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In this case it was agreed that the judge was not entitled to enter judgment for the plaintiffs : it follows from my views that he could not give leave to defend conditionally on the case being tried without a jury, or put the case in the short cause list under Order XIV., r. 6. He has not considered or purported to act under Order XIV., r. 8. The order should therefore in my opinion be set aside and the case should be remitted to the Master for further directions, in which case he may put the case into the short cause list under r. 8, but not so as to deprive the defendants of their right to a jury.

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In this case also it is agreed that the plaintiffs are not entitled to judgment under Order XIV. The conditional leave to defend given under r. 6 is therefore in my opinion wrong. The defendant does not object to trial by a judge alone, but he does object to the short cause list. The Master could have made an order under r. 8 putting the case in the short cause list if he had considered the matter from that point of view, and if he had made such an order the Court would not have interfered with his discretion. But in my opinion the order was wrongly made under r. 6 and was wrong in ordering trial by a judge alone unless the defendant consents. I think the order should be set aside and the case should be remitted to the Master who may give directions under r. 8. As this will make no practical difference in the result I think the costs here and before the judge should be costs in the cause.

The practical result for the future in my view is that the class of cases where, to use the phrase of one of the counsel, the plaintiff has " very nearly a right to judgment under Order XIV.," but not quite, must be excluded from the operation of conditional leave to defend. The Master must face the question, Is the plaintiff entitled to judgment under Order XIV. ? Unless he can answer Yes, he cannot impose conditions under Order XIV. or use the new Form VII. of the Orders. Procedure under Order XIV., r. 8, is a separate matter providing for directions but not imposing conditions. That procedure is not warranted by Form VII. and cannot be used to deprive a defendant of trial by a jury.

GREER L.J. These appeals raise important and difficult questions on the construction and operation of Order XIV., r. 6, and Order XXXVI., r. 6. In each case the plaintiffs in an action commenced by a specially indorsed writ applied for summary judgment under Order XIV. In each case the defendants filed affidavits which admittedly raised triable issues and entitled the defendants to an order for leave to defend. In both cases the Master gave leave to defend on condition that the actions were tried in the short cause list by a judge without a jury. In the first case the defendants did not take any objection to the action being put into the short cause list but applied for a trial with a jury. This was refused by the Master who made the order as above stated. In the second case the defendant objected to the case being put into the short cause list and desired to have the greater opportunities of discovery and inspection which would be afforded if the case proceeded in the normal way, but did not apply for a jury. On appeal the orders of the Master were confirmed by the judge in chambers.

The appeals thus raise two questions: (1.) Can the Court make any conditions as to mode of trial in a case where there is a triable issue which prevents judgment and entitles the defendant to have leave to defend? And (2.) In any event, can the Court under Order XIV., r. 6, impose a condition depriving the defendant of the right to trial by jury which he would otherwise have by reason of Order XXXVI., r. 6? In my judgment the Master had power to make the orders that he made in each case.

It was contended by the defendants that the Court could only make an order under Order XIV., r. 6, imposing conditions as an alternative to entering judgment, that is to say, the power to impose conditions only arose, where the defendant failed to show that there was a triable issue. This contention seems to me practically to delete r. 6 from the rules. If there be a triable issue the defendant would, in the absence of r. 6, be entitled to unconditional leave to defend; if there be no triable issue the plaintiff would be entitled to judgment. If the defendant in the one case did not get unconditional leave to defend, he would be entitled to have the order set aside on appeal; if, on the other hand, the plaintiff who had established his right to judgment was put off with a conditional order for leave to defend he would be able to get the order reversed on appeal. There would be no room at all for the operation of r. 6.

It is true that the words of Order XIV., r. 1, are that the judge "may make an order empowering the plaintiff to enter judgment accordingly." But I think the word "may" must, having regard to the provisions contained in r. 4, be read as equivalent to "shall." Rule 4 is as follows: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim." If where no defence is shown to part of the claim the judge has no option but to give judgment for that part of the claim and no power to give leave to defend conditionally or unconditionally, it would be an odd state of the law that he should have the power to refuse to give judgment in respect of a claim as to the whole of which the defendant has failed to show that he has any triable defence. Where there is nothing to try, the Court cannot in my judgment order any form of trial, but must give the plaintiff leave to enter judgment.

Order XIV., r. 6, has performed a very useful purpose by enabling speedy trials to be ordered in cases where, though the defendant has established that there is a triable issue, it seems just and convenient that there should be a prompt trial in cases where the defence raises a simple issue and in cases where, though there is a triable issue, the success of the defence seems improbable. From any point of view the wording of the rule makes it somewhat illogical; but in this case logic must give way to convenience. It seems odd that a defendant who is entitled to defend should be told by the Master or the judge that unless he performs conditions laid down in the order there will be judgment against him; and if a condition is imposed in this form, it might conceivably make the order for leave to defend illusory. In *Jacobs* v. *Booth's Distillery Co.* (1) the order which the House of Lords reversed was to the effect that, unless the defendant paid the whole amount of the claim into Court, judgment should be given for the plaintiff. An order in this form would, in the case of a man who was unable to find the money, entirely deprive him of the right to defend which the order purported to give him. In my judgment all that was meant by the decision in *Jacobs*' case (1) is that, where a defendant is entitled to defend, an order cannot be made upon him that, if he does not comply with a prohibitive condition, judgment shall go against him.

It is worthy of notice that terms as to the mode of trial, such as were ordered in the present case, are not conditions in the same sense as the order in *Jacobs*' case (1) or an order to the same effect as the one made in *Jacobs*' case (1) was or would be conditional. Neither of the orders under consideration in these appeals is an order for judgment; they merely prescribe the methods whereby the plaintiffs or defendant's right to judgment is to be determined. Though the power to impose conditions, if the word "conditions" is strictly construed, seems to have no logical place in proceedings under Order XIV., this does not in my judgment justify the Court in treating the rule as a nullity; though illogical, the power to impose conditions may be, and has in practice been found to be, both just and convenient. If I am right, these considerations dispose of the only question involved in the second case, as the defendant did not in that case take any objection to the order for trial by judge alone.

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(1) 85 L. T. 262.

The other point which falls to be decided in the appeal of the defendants in the first case involves the question whether the provisions of Order XXXVI., r. 6, override those of Order XIV., r. 6, and so prevent the judge from imposing on the defendant a condition that deprives him of the right to have his case tried by a jury, which in the absence of such condition he would undoubtedly have under the express words of a rule which is later in number. Order XXXVI., r. 6, reads as follows: [The Lord Justice read Order XXXVI., r. 6, and then Order XIV., r. 6, and proceeded:] It is impossible to contend that either of these rules is ultra vires. The question to be decided is which of them is to prevail. In *Ford* v. *Blurton* (1) Bankes L.J. points out that until the year 1854 it was the undoubted right of every litigant in the Common Law Courts to have his case tried by a jury. This right was not restricted by the Common Law Procedure Act, 1854, except in cases of account. That Act also made provision for trial without a jury by consent of the parties. A radical change was made by the Judicature Act, 1873. For the first time power was conferred on the King in Council to legislate on the question what cases should be tried by a judge alone and what cases should be tried by judge and jury, by Rules of Court for regulating any matters relating to practice and procedure: see 36 & 37 Vict. c. 66, s. 68. As soon as the Act came into force the rules contained in the Schedule were to operate until they were altered by a majority of the judges of the Supreme Court of whom the Lord Chancellor was to be one. The rules had to be laid before Parliament and might be annulled. Rule 7 of the scheduled rules was the forerunner of Order III., r. 6, and Order XIV. It contained the express provision: "Permission to defend the action may be granted to the defendant on such terms and conditions, if any, as the judge or Court may think just." Rule 30 of the Schedule contained a definition of the words "Mode of trial": "Actions shall be tried and heard either before a judge or judges, or before a judge, sitting with assessors, or before a judge and jury or before an official or special referee, with or without assessors." The rules contained provisions as to when a litigant was to be entitled to have his case tried by a jury. The Rule Committee were thus given power to alter these rules subject to the power of Parliament to annul any of them. It seems quite clear that the Rule Committee were thus given power to provide by rule what cases should or what should not be tried by a jury.

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(1) 38 Times L. R. 801.

Order XXXVI., r. 7 (*a*), which was the rule in operation from 1883 onwards, preserved the right to trials by jury except in certain specified cases. But the rule giving power to impose conditions on giving leave to defend only applied to cases that could be tried by a judge alone. In 1893 r. 6 of Order XIV. was altered by leaving out the words, which the old rule contained, "in cases which under these rules may be tried without a jury." It then became a rule having the force of a statute to the effect that in all cases where there was an application for judgment under Order XIV. leave to defend might be given subject to a condition as to the mode of trial. This seems to me to involve that the condition might provide for any of the modes of trial mentioned in the original rules scheduled to the Act of 1873, i.e. judge alone, judge and jury, judge with assessors, or Official Referee with or without assessors. I cannot read the rule otherwise than as establishing an exception to the general rules as to mode of trial contained in Order XXXVI. There has been no actual decision to this effect, but it is supported by the high authority of the dicta of the Court of Appeal in *Wolfe* v. *De Braam* (1) and of Lord Sterndale (then Pickford J.) in *Macartney* v. *Macartney*. (2)

It remains for me to consider whether the later history of the provisions by statute and rule as to the mode of trial affect the conclusions above stated. In consequence of the War it became increasingly difficult to find juries for the

(1) 81 L. T. 533. (2) 25 Times L. R. 818.

trial of common law cases, and in July, 1918, an Act of Parliament (1) was passed providing that trial should be by judge alone, except in cases where fraud was alleged, cases of libel, slander, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, and in cases where it appeared to the Court that any question or issue was more fit to be tried with a jury than without a jury. Sect. 2 of the Administration of Justice Act, 1920, again altered the law by enacting that the Court or a judge should have power, on the application of either party, to order trial without a jury if he thought that the case could not be as conveniently tried with a jury as without a jury, but this was not to apply to the cases involving reputation which were enumerated in proviso (*a*). This statute had the effect of depriving the parties of a right to a jury in all cases except those mentioned in the proviso and leaving the question of the mode of trial in all other cases to the discretion of the judge in chambers. The Act received a good deal of criticism, and in 1925 it was decided by Parliament that the state of the law as it existed before 1918 should be restored. This was done by the Administration of Justice Act, 1925, which gave power to the Rule Committee to make rules prescribing in what cases trials should be with a jury and in what cases without a jury, and provided that, until such rules were made, those in force immediately before the passing of the Act of 1918 should be in force. It is by the force of this statute that Order XIV., r. 6, and Order XXXVI., r. 6, now operate. The case therefore falls to be decided in the same way as it would have been decided if it had arisen before the Act of 1918 was passed.

The alteration of Order XIV., r. 6, by omission of the words referring to cases in which the action could be tried by judge alone seems to me to justify the rule being read as an amendment of the rules as they existed at the date of the alteration. In so far as it is inconsistent with any of the rules then in operation, it must be read in the same way that a provision in a later statute would be read as a modification of the provisions of an earlier statute with which it is inconsistent. The Supreme Court of Judicature (Consolidation) Act, 1925, does not affect the question under consideration. Sect. 99 expressly provides that Rules of Court may be made (inter alia) (*h*) for prescribing in what cases trials are to be with a jury and in what cases they are to be without a jury. But no new rules have yet been made under the power thus expressly given to the Rule Committee.

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(1) The Juries Act, 1918 (8 & 9 Geo. 5, c. 23). The Act only had effect during the continuance of the War and for six months thereafter.

The considerations above stated have satisfied me that both these appeals ought to be dismissed with costs.

SLESSER L.J. These appeals raise questions of practice on which there is little direct authority. In *Kodak, Ld.* v. *Alpha Film Corporation* the plaintiff company sue the defendant company for a sum for the price of goods sold and delivered on a specially indorsed writ. The usual affidavit was sworn in support of the application for judgment, stating that the defendants were justly and truly indebted to the plaintiffs as alleged in the writ, and further stating that, in the belief of the deponent, there was no defence to the action. The defendants, by their secretary, set up what is admitted to be a triable defence; they contend that the goods forming the subject matter of the action were not ordered by the defendant company, but say that they were ordered by a third party, and further say that any payments made by them to the plaintiffs were made on behalf of and on account of the third party to the knowledge of the plaintiffs. These allegations are put in issue in a second affidavit on behalf of the plaintiff company, but at the bar counsel conceded that there was a triable issue to go before the Court.

The matter came before the Master, who ordered that the defendant company be at liberty to defend the action on condition that the action should be entered in the short cause list for trial by a judge alone—without a jury. The defendants desire a jury. They do not object in terms to being in the short cause list. This order was made on March 6, 1930, and follows a form prescribed by the Masters for use in the central office which first appears in 1929: see [1929] W. N.,

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Pt. 2, 198. This form, so far as regards District Registries, was approved by the Lord Chancellor on July 5, 1929. The words "on condition that the action be entered in the short cause list for trial by a judge alone or by a judge and jury" are new. The earlier form ran, "It is ordered that the defendant be at liberty to defend this action and that the action be entered for trial in the short cause list"; no condition being inserted. On appeal to MacKinnon J. the appeal was dismissed.

In *Kodak, Ld.* v. *Alpha Film Corporation* three grounds have been urged before us why this order should be disallowed, in *Huth* v. *Jackson* the last ground alone applies. In the first place, it is said that the condition that the action should be entered for trial without a jury is contrary to the rules, or secondly, is ultra vires. The third ground of objection I discuss later. By s. 99, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that Rules of Court may be made (inter alia) for the following purposes: "(*h*) for prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury." By s. 226, sub-s. 1, of the same Act certain enactments are repealed of which one is the Administration of Justice Act, 1925, s. 3, but by s. 226, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, it is provided that nothing in the repeal shall affect any rule made under any enactment repealed by that Act. The Supreme Court of Judicature (Consolidation) Act, 1925, became law on July 31, 1925. The latest material rules dealing with juries, that is to say Order xxxvi., rr. 2 and 6, are dated June 22, 1925, and are therefore earlier in date than the Supreme Court of Judicature (Consolidation) Act, 1925, and were made under the Administration of Justice Act, 1925, but are kept alive by reason of s. 226 of the Consolidation Act, above mentioned.

Rules 2 and 6 of Order xxxvi. are in the following terms:—

"2. In every cause, matter or issue, unless under the provisions of rule 6 of this Order a trial with a jury is ordered, the mode of trial shall be by a judge without a jury:

provided that in any such case the Court or a judge may at any time order any cause, matter or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."

"6. In any cause, matter or issue other than those mentioned in rules 3, 4 and 5 of this Order, upon the application (not later than ten days after the close of the pleadings, or where there are no pleadings at the time of or within ten days after the order directing the mode of trial) of any party thereto for a trial with a jury of the case, matter or issue, an order shall be made for a trial with a jury."

So far it is clear that the defendant company, under the statute and Order XXXVI., r. 6, made thereunder could have asked for an order for trial with a jury, but the learned Master has exercised the power which he believed himself to possess under Order XIV., r. 6, to refuse the defendant company a jury. This rule is as follows: "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit."

The reason which the defendants give on the first head for objecting to the condition sought to be imposed upon them is as follows: They say that the power to give leave to defend, subject to such terms as to mode of trial as the judge may think fit, cannot extend to a determination whether the mode of trial shall or shall not include a jury because of the express right to have a jury given to them under Order XXXVI., r. 6. Were such a contention wholly unconsidered by authority, I myself should have come to the conclusion that the argument was ill-founded. It is true that Order XXXVI., r. 6, in general terms does confer a right to a jury in appropriate cases, of which this is one, but a general right may be limited by particular restrictions and it is impossible in my view to read the words in Order XIV., r. 6, otherwise than as empowering the judge to give leave to defend, subject to such terms as to mode of trial as he may think fit without qualification. The attempt to limit the phrase "mode of trial" in Order XIV., r. 6, to matters which do not include the power to provide for the presence or absence of a jury must fail. The expression "mode of trial" is to be found in r. 30 of the Schedule to the Judicature Act, 1873, a rule which deals in terms, among other matters, with actions being tried and heard before a judge or before a judge and jury: see also Order XXXVI., r. 2, which speaks of "the mode of trial" being by a judge without a jury. It is similarly employed to include the question of the provision whether there shall be a jury in Order XXXVI., r. 1. In addition we find this significant fact. From 1883 till 1893 limiting words appeared in Order XIV., r. 6; the power to make conditions was then confined to "cases which under these rules may be tried without a jury": see Annual Practice, 1893, p. 319. Had these words, so confining the cases to those to be tried without a jury, remained in the rule, no question as to any possible conflict between Order XIV., r. 6, and Order XXXVI., r. 6, could easily have arisen; but in 1893 these qualifying words were taken out of the rule and the present unrestricted power to make conditions as to the mode of trial was left and the rule has so remained ever since.

This, in itself, is indicative of the intention of the rule-makers that it should be general in its application, and that the policy of preserving the right to a jury, unaffected by the power to make conditions under Order XIV., r. 6, as to mode of trial, was abandoned in 1893.

The general rule is that a deliberate change of expression must be taken prima facie to import a change of intention: per Lord Westbury in *Ricket* v. *Metropolitan Ry. Co.* (1) When it is found that governing words have been omitted which, if they had been in would have made the matter plain, there can be no doubt what the intention of the Legislature was: per Lord Coleridge C.J. in *Hodgson* v. *Bell.* (2)

Finally, on this head, we have authority—in a sense obiter, but yet very germane to the issue—in the case of *Wolfe* v. *De Braam* (3), in which the Court of Appeal expressed the opinion that if the judge in making an order giving the

(1) (1867) L. R. 2 H. L. 175, 207.
(2) (1890) 24 Q. B. D. 525, 527.
(3) 81 L. T. 533.

defendant leave to defend had made it one of the terms of the order that the trial should be without a jury, they would not have interfered with such a direction: and this view is followed by Pickford J. (as he then was), in *Macartney* v. *Macartney* (1), in which he said: "It was clear that the Master could attach any condition he pleased in giving leave to defend, and therefore he could attach conditions as to the mode of trial." The mode of trial there raised the question whether it should be with or without a jury. I think therefore that this argument must fail.

The second ground on which Order XIV., r. 6, is impeached is that if it does include a power to withhold a jury it is ultra vires. This argument appears to be based upon an assumption that there is still at common law a right to a jury which, it is said, cannot be displaced in the absence of express statutory enactment: see *Chester* v. *Bateson.* (2) But such a contention reposes upon an erroneous assumption. Before the Common Law Procedure Act, 1853, the argument might have been well founded, but that statute "introduces for the first time a possibility of a trial by a judge alone in a common law action" and "the right of either party to a jury was preserved by rules scheduled both to the Judicature Act, 1873, and to the Judicature Act, 1875": per Bankes L.J. in *Ford* v. *Blurton.* (3) A consideration of the history of the right to a jury as shown in the Juries Act, 1918, and the Administration of Justice Act, 1920, together with the Administration of Justice Act, 1925, makes it clear that the present right to a jury is wholly statutory and is dependent now upon Rules of Court either continued by s. 226 of the Supreme Court of Judicature (Consolidation) Act, 1925, or made under s. 99, sub-s. 1 (*h*), of that Act. When it is remembered that by the Administration of Justice Act, 1920, s. 2, the trial by jury in the High Court, subject to certain exceptions, was generally left to the discretion of the Court on consideration of convenience, it is patent that any argument based upon the alleged common law right to a jury

(1) 25 Times L. R. 818, 819. (2) [1920] 1 K. B. 829.
(3) 38 Times L. R. 801, 802.

must fail. If then there is no such inherent right, the question resolves itself into the effect of two rules both made by authority of statute, the one conferring on the litigant the right to a jury, the other depriving him of that right under specified conditions. In this possible conflict of two rules questions of interpretation may indeed arise but not the question of ultra vires. "Generalia specialibus non derogant."

The third and last ground on which it is said that this order should be disallowed, which applies to both appeals, but is confined in *Huth* v. *Jackson* to an objection to an order placing the case in the short cause list, is that, there being in both cases triable issues, the Court cannot make conditions where the defendant is entitled to have leave to defend, and judgment cannot therefore be given before trial. This contention would certainly be valid were it not for the provisions of Order XIV. In my judgment that Order has produced a condition of affairs which, subject to one important qualification mentioned hereafter, enables the Court, in the case of a defendant appearing to a writ of summons specially indorsed under Order III., r. 6, to give leave to defend with or without conditions of the kind mentioned in r. 6, or to refuse it at the discretion of the Court, and this irrespective of the degree of merit of the defence. In my view the limitation of discretion on triable issues arises only where the condition sought to be imposed would make the leave to defend illusory. This is most likely to happen in cases where the condition relates to payment into Court as security. Thus "when the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reason for thinking that his defence is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into Court as a condition to his being allowed to come in and defend the action": per Cockburn C.J. in *Runnacles* v. *Mesquita*. (1) In *Jacobs* v. *Booth's Distillery Co.* (2) the House of Lords decided that where there is a triable issue, the Court should not order so large a sum to be paid by way of security under Order XIV.,

(1) (1876) 1 Q. B. D. 416, 418.

(2) 85 L. T. 262.

r. 6, as a condition to defend, as would have the result that, in the language of Lord Halsbury L.C., the rights would not be litigated at all: see also *Wing* v. *Thurlow* (1); *Ward* v. *Plumbley* (2); *Bowes* v. *Caustic Soda, &c., Syndicate.* (3) Order XIV., r. 6, which has already been quoted, speaks of leave to defend being given unconditionally, or subject to such terms as to giving security or mode of trial or otherwise as the judge may think fit. This on the face of it would appear to give to the Court an unqualified discretion. The cases of *Jacobs* v. *Booth's Distillery Co.* (4); *Runnacles* v. *Mesquita* (5); *Reaveley* v. *Nicolopulo* (6) and others must now be read as limiting this discretion by saying that security or payment in may not be ordered to such an extent as would have the effect of excluding the defendant from his right to defend altogether, that is to say, conditions may not be attached to leave to defend, in a case where leave to defend ought properly to be given, which would have the effect of making that leave nugatory by asking for such security as would in effect prevent the defendant from defending at all; but the reasoning in *Jacobs'* case (4) does not seem to me to have application to a case where the condition made is, as in the present cases, merely procedural as to time or mode of trial.

In the second appeal argued before us, that of *Huth* v. *Jackson*, the facts of which it is not necessary to set out, the condition objected to by the defendant and ordered on an admittedly triable issue was, as I have said, that the case should go into the short cause list, which is a condition as to time. In *Kodak, Ld.* v. *Alpha Film Corporation* conditions both as to time and mode of trial arise. But the principle to be determined is the same. In my view, in both cases the Court has within r. 6 in its discretion an unfettered power to impose conditions, subject only to this, that such conditions must not operate unjustly to deprive the defendant of his right to defend at all—a consideration which can hardly arise in cases of time or mode of trial, though it is, as the cases

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(1) (1893) 10 Times L. R. 53, 151.

(2) (1890) 6 Times L. R. 198.

(3) (1893) 9 Times L. R. 328.

(4) 85 L. T. 262.

(5) 1 Q. B. D. 416.

(6) (1893) 28 Law Journal Newspaper, 508.

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have indicated, very material when the condition is one of payment into Court or the giving of security.

For these reasons, I agree with Greer L.J. that these appeals must be dismissed.

*Appeals dismissed.*

KODAK, LIMITED *v.* ALPHA FILMS, LIMITED.

Solicitor for appellants: *E. M. Tringham.*
Solicitor for respondents: *C. J. Odhams.*

FREDERICK HUTH AND COMPANY *v.* JACKSON.

Solicitors for appellant: *Davies, Arnold & Co.*
Solicitors for respondents: *Slaughter & May.*

W. H. G.

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*March* 28;
*April* 11.

## FISHER *v.* OLDHAM CORPORATION.

[1929. F. 956.]

*Local Government—Borough Corporation—Watch Committee—Police Authority—Unlawful Act of Borough Police—Wrongful Arrest—False Imprisonment—Liability of Borough Corporation—Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 190, 191—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 20–24—*Police Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 46), *ss.* 1, 4—*Police* (*Appeals*) *Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 19), *ss.* 1, 2.

The police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment.

*Coomber* v. *Justices of Berks* (1883) 9 App. Cas. 61 and *Stanbury* v. *Exeter Corporation* [1905] 2 K. B. 839 followed.

*Goff* v. *Great Northern Ry. Co.* (1861) 3 E. & E. 672 and *Edwards* v. *Midland Ry. Co.* (1880) 6 Q. B. D. 287 commented upon.

*Lambert* v. *Great Eastern Ry. Co.* [1909] 2 K. B. 776 distinguished.

*Bradford Corporation* v. *Webster* [1920] 2 K. B. 135 considered.

ACTION tried by McCardie J. without a jury.

The following statement of the facts is taken substantially from the judgment of the learned judge :—

In March, 1929, a person known as Fred Russell obtained 150*l.*, by alleged false pretences, from a tradesman in Oldham. Information was duly laid, and on April 4, 1929, a warrant was issued under the hand of a justice of the peace for the borough of Oldham for the arrest of Russell. The man Russell was said to be well known to the Oldham police. He could not be found in Oldham. It was suspected that he had fled to London, and the Oldham police communicated with the London police. Fisher, the plaintiff, had for six years dealt in timber at Plaistow, but in former years he also had become well known to the police, and had been sentenced several times for the offence of obtaining money by false pretences. The police believed that he was the wanted man. He was, therefore, arrested by a London police officer at his premises in Plaistow on April 25, and taken to the local police station and put into a cell till the morning of April 26. He was then handed over to Inspector Sharples, of the Oldham police, and was taken in custody to Manchester by train and then taken by a motor car to the police station at Oldham and there detained for several hours. It was then discovered that a mistake had been made, and that the plaintiff was not the wanted man. He was accordingly released.

The plaintiff thereupon brought the present action against the corporation of the borough of Oldham claiming damages for false imprisonment.

The allegations in the statement of claim, so far as material to the main question raised in the case, are stated below in the earlier part of the judgment of the learned judge.

The defendants in their defence denied that they were liable for the action of the Oldham police in causing the arrest and detention of the plaintiff.

*Tristram Beresford* for the plaintiff.

*Roland Oliver K.C.* and *W. T. Monckton K.C.* for the defendants.

The arguments of counsel and the authorities cited appear from the judgment.

McCardie J. This case is important to local authorities, to the police and to the public. It presents a question of unusual interest, and it raises, with sharp directness, the relations between the police and local bodies. The action is one for false imprisonment. The facts are few and undisputed. [His Lordship stated the facts substantially as above set out and continued as follows :] It is admitted by the defendants that there is here a case of false imprisonment as against an appropriate defendant : see *Hoye* v. *Bush* (1) and Clerk and Lindsell on Torts, 8th ed., p. 711. If the defendants be liable, then the damages are agreed at the sum of 125*l*.

The question is whether the defendant corporation are liable for the action of the Oldham police in causing the wrongful arrest of the plaintiff and in wrongfully keeping him in custody during April 26.

The statement of claim, so far as material to the present point, alleges that " the defendants, acting through their Watch Committee, are the police authority for the county borough of Oldham, and are the employers of the police for the said borough." It is also alleged that the Oldham police and Inspector Sharples, in causing and continuing the arrest and imprisonment of the plaintiff, were " acting in the course of their employment for and on behalf of the defendants."

The facts and contentions in this case clearly raise a question of wide importance. The police here did not act on any specific order from the defendants ; they acted on their own initiative. Admittedly, this is the first time that the question before me has been definitely raised for decision. If the defendants are held liable, then a new and serious liability falls on many local authorities. I am glad to say that the question was fully and ably argued before me.

Is the relation between the defendants and the Oldham police such as to make the defendants liable in law to the plaintiff ? I must first mention the Municipal Corporations Act, 1882. By s. 190, sub-s. 1, it is provided that " The council shall from time to time appoint, for such time as they think fit, a sufficient number not exceeding one third

(1) (1840) 1 Man. & G. 775.

of their own body, who, with the mayor, shall be the watch committee." By sub-s. 2: "The watch committee may act by a majority of those present at a meeting thereof, but shall not act unless three are so present." Sect. 191 contains several important provisions. Sub-s. 1 says: "The watch committee shall from time to time appoint a sufficient number of fit men to be borough constables." Sub-s. 2 says: "A borough constable shall be sworn in before a justice having jurisdiction in the borough, and when so sworn shall, in the borough, in the county in which the borough or any part thereof is situate, and in every county being within seven miles from any part of the borough, and in all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable has and is liable to for the time being in his constablewick, at common law or by statute, and shall obey all such lawful commands as he receives from any justice having jurisdiction in the borough or in any county in which the constable is called on to act." Sub-s. 3: "The watch committee may from time to time frame such regulations as they deem expedient for preventing neglect or abuse, and for making the borough constables efficient in the discharge of their duties." Sub-s. 4: "The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same." Sect. 140 of the Act of 1882 provides for the application of the borough fund and refers to the Fifth Schedule of the Act. Schedule 5 provides for certain payments out of that fund, including "The payments to be made under this Act to or in respect of the borough police and to any special constable, including the following payments (namely); (*a*) Such salaries, wages, and allowances to the borough constables, and at such periods, as the watch committee, with the approbation of the council, direct."

I pause here for a moment to say that Mr. Tristram Beresford, for the plaintiff, submitted that the effect of the above provisions was to create, in substance, the relation of master and servant between an Oldham police officer and the Oldham Corporation. He contended that the defendants possessed (*a*) the power to appoint; (*b*) a duty to pay salary or wages; (*c*) a power to make regulations; and (*d*) a power to dismiss, and that therefore the above named relation was created.

It is necessary, however, before I consider that argument, to refer to several other statutory provisions. In the first place, the effect of ss. 20 to 24 of the Local Government Act, 1888, is that the State contributes a substantial amount towards the cost of the defendants' police force: see s. 24, sub-s. 2 (*j*). In the next place, the Police Act of 1890 (53 & 54 Vict. c. 45) provides for a scheme of pensions, allowances and gratuities for police officers throughout the kingdom. This Act indicates the fullness of central administrative control. In the next place, the Police Act, 1919, created a Police Federation for the objects stated, and s. 1, sub-s. 2, provides that "The Police Federation and every branch thereof shall be entirely independent of and unassociated with any body or person outside the police service." By s. 4 of the same Act it is provided that "It shall be lawful for the Secretary of State to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made." In pursuance of s. 4, the Secretary of State framed and issued in 1920 a large body of regulations which dealt fully and minutely with such matters as ranks, designation, appointment, discipline, promotion, hours of duty, pay, allowances, clothing, and the like. Further, in 1927, there was passed the Police (Appeals) Act, 1927 (17 & 18 Geo. 5, c. 19), which provided (inter alia) by s. 1: "A member of a police force who after the passing of this Act is dismissed or required to resign as an alternative to dismissal may appeal to a Secretary of State in accordance with this Act and the rules made thereunder. . . ." Under s. 2 the Secretary of State may (*a*) allow the appeal, (*b*) dismiss it, or (*c*) vary the punishment, and may for the purposes of deciding the appeal direct that an enquiry be held. I may here observe that the Home Secretary is the central police authority: see Halsbury's Laws of England, vol. vii., p. 85, and vol. xxii., p. 516. I need not refer to any other statutory provisions.

I must now say a few words as to the common law status of police officers. Much of the relevant history of constables will be found in Lambard's Duties of Constables (1619), p. 6; 2 Hawkins' Pleas of the Crown, c. 10, ss. 33 et seq.; and Blackstone, vol. i., pp. 356, 357. Some of the errors of Blackstone are well discussed by Professor H. B. Simpson in the English Historical Review of October, 1905. I may also refer to Halsbury's Laws of England, vol. xxii., pp. 462 et seq. It is plain that the modern system of police forces has slowly evolved from the succession of officers of police who have, at different times and under various titles, maintained the internal peace of the kingdom. In the reign of Charles II. the practice of swearing in constables before justices of the peace was expressly sanctioned by statute. Professor Simpson well observes in the above mentioned article as follows: "Perhaps the administration of the oath to Constables by Justices of the Peace may be fairly considered as the characteristic mark of the final subordination of local to central government in rural districts and of the conversion of a local administrative officer into a ministerial officer of the Crown." What is the common law view of the matter as shown by the legal decisions and authorities? It is clear from *Mackalley's Case* (1) that a constable, watchman or the like person was regarded as a servant or minister of the King. In *Coomber* v. *Justices of Berks* (2) Lord Blackburn said: "I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of Government, nor that by the constitution of this country these functions do, of common right, belong to the Crown." In

(1) (1611) Co. Rep. Pt. IX., 65b, 68b.

(2) 9 App. Cas. 61, 67.

the same case he further said: "The general Government administers law and justice, and keeps order; but it necessarily does it in different localities separately. . . . . It is a purpose of the imperial Government, carried out in a particular locality, but not the less a purpose of the imperial Government." (1) The whole ratio decidendi of *Coomber's* case (2) was that the police were the servants of the Crown and not of the local authority. The Privy Council have recently adopted and restated the principle of *Coomber's* case (2): see *Metropolitan Meat Industry Board* v. *Sheedy*. (3)

It is of interest here to set out the oath which is taken before a justice of the peace by each constable of the Oldham Police Force, pursuant to s. 191, sub-s. 2, of the Municipal Corporations Act, 1882. It is as follows: "I . . . . of . . . . Street, in the Borough of Oldham do declare that I will well and truly serve and act as a Constable of the said Borough of Oldham for preserving the peace by day and by night and preventing robberies and other felonies and misdemeanours and apprehending offenders against the Peace." It will be observed that this oath is not an oath to act as a servant of the corporation. It is an oath that the deponent will faithfully discharge his duties as a constable for the preservation and enforcement of the law.

I now pause to point out that s. 191 of the Municipal Corporations Act, 1882, gives but limited powers to the watch committee of the defendant corporation. Any appointment by them of a police constable is subject to the controlling regulations of the Home Secretary and to a swearing in before a justice of the peace. Sect. 191, sub-s. 2, provides that a constable shall obey such orders as he receives from a justice of the peace. There is no similar provision as to the orders of the watch committee. Sect. 191, sub-s. 3, merely relates, I think, to minor regulations for securing the efficiency of the police, their readiness and ability to obey the orders of justices of the peace, and the fulfilment of their well known statutory and common law duties. Sect. 192 of the Act

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(1) 9 App. Cas. 71.
(2) 9 App. Cas. 61, 67.
(3) [1927] A. C. 899, 903.

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provides that: "The Watch Committee shall, on the 1st January, the 1st July, and the 1st of October in every year, send to the Secretary of State a copy of all rules from time to time made by the Watch Committee or the Council for the regulation and guidance of the Borough Constables." Under s. 191, sub-s. 4, the powers of suspension are shared with the local magistracy and that power equally with the power of dismissal is rigorously controlled and limited by the statutory provisions I have already mentioned.

Prima facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation. This is the view so clearly expressed in Beven on Negligence, 4th ed., vol. i., p. 417, when, referring to the question of the liability of local authorities for the negligence of the police, he says: "Thus neither in the corporation, nor in the watch committee, nor in the justices, nor yet in the chief constable, do those qualities inhere which are necessary to be found for the purpose of establishing a relation raising a legal liability." The like view was stated with equal clearness in the case of *Stanbury* v. *Exeter Corporation.* (1) Lord Alverstone C.J. said: "This case . . . . is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts." (2) So, too, Wills J. said: "This case is, to my mind, almost exactly analogous to the case of a police officer. In all boroughs the watch committee by statute has to appoint, control, and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties." (3) Darling J. expressed substantially the same view. *Stanbury's* case was considered and applied by the High Court of

(1) [1905] 2 K. B. 838.
(2) [1905] 2 K. B. 841.
(3) [1905] 2 K. B. 842.

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Australia in *Enever* v. *The King*. (1) Illuminating judgments were given by Griffith C.J. and Barton and O'Connor JJ. The whole of the English decisions were discussed. As Griffith C.J. said: "At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown." (2) He further said: "Now, the powers of a constable, quâ peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. . . . . A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application." (3) Each of the judgments in *Enever's* case (1) is, if I may say so, most weighty and most instructive. The like view has been taken by the Supreme Court of Canada in *McCleave* v. *City of Moncton* (4), where it was held that a police officer is not the agent of the municipal corporation which appoints him to the position, and if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. So, too, in *Buttrick* v. *City of Lowell* (5), Bigelow C.J., in giving the judgment of the Supreme Court of Massachusetts, said: "Police officers can in no sense be regarded as agents or officers of the city. Their duties are of a public nature." And, finally, a similar view has been taken by the Supreme Court of South Africa: see *British South Africa Co.* v. *Crickmore*. (6)

I may well take an illustration at this point. Suppose that a police officer arrested a man for a serious felony? Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released? Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice.

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(1) (1906) 3 Commonwealth L. R. 969.

(2) Ibid. 975.

(3) Ibid. 977.

(4) (1902) 32 Can. S. C. 106.

(5) (1861) 1 Allen (Massachusetts), 172.

(6) S. A. L. R. [1921] A. D. 107.

I have set out the above cited aggregate of opinion and decision because I think it best to do so before entering upon the embarrassing task of considering the cases quoted to me by Mr. Tristram Beresford in support of his vigorous argument for the plaintiff. Those cases indicate, I fear, the confusion which so often arises in English law either because counsel do not raise the necessary points or because the Courts do not receive a sufficient citation of the relevant authorities. I take first *Lambert* v. *Great Eastern Ry. Co.* (1) There, the Court of Appeal held that a special constable of a railway company is the servant of the company, and, if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion, an action for false imprisonment will lie against the company. In that case the special constable had been appointed by the defendant railway company under the Great Eastern Railway (General Powers) Act, 1900 (63 & 64 Vict. c. cx.), and had been duly sworn in before a justice of the peace. I respectfully abstain from analysing the judgment of the Court. But I venture to express surprise that *Stanbury's* case (2), was not even mentioned to the Court, nor was any adequate argument presented as to the special position, duties and powers of constables. The Court of Appeal mentioned two decisions only in their judgment—namely, *Goff* v. *Great Northern Ry. Co.* (3) and *Edwards* v. *Midland Ry. Co.* (4) Neither of those cases was reported with adequate fullness. In neither report is the Special Act of the railway company set out. In each case it seems to have been assumed that the effect of the Special Act was to render the constable the servant or at least the agent of the railway company. The earlier of the two decisions rested, apparently, on

(1) [1909] 2 K. B. 776.
(2) [1905] 2 K. B. 838.
(3) 3 E. & E. 672.
(4) 6 Q. B. D. 287.

the particular words of ss. 103 and 104 of the Railway Clauses Act, 1845, which dealt, in substance, with the offence of travelling with intent to avoid payment of fare. It is difficult to know whether the later case of *Edwards* v. *The Midland Ry. Co.* (1), turned on some well known Special Act of the Midland Railway Company. I assume that it did. The Court in *Lambert's* case (2) relied to some extent on *Goff's* case (3) and *Edwards*' case (1), but in substance, I think, rested their judgment upon the effect of s. 50 of the Great Eastern Railway (General Powers) Act, 1900, and they held that the effect of that particular section was to make the constable of the defendant company a servant or agent so as to render the company liable for wrongful acts done within the scope of his authority. *Edwards*' case (1), therefore, on which the plaintiff's counsel so much relied, rests upon a special basis, and is clearly distinguishable from the case now before us.

I now turn to a decision to which the plaintiff's counsel also attached importance. I refer to *Bradford Corporation* v. *Webster.* (4) The facts, so far as material now, can be most briefly stated. A police constable, appointed by the watch committee of the Bradford Corporation was, whilst on traffic duty in Bradford, injured in September, 1917, through the negligence of the defendant's servant when driving a steam wagon. He was permanently incapacitated by the injury. The plaintiff corporation thereupon brought an action against the defendant to recover (*a*) the pay of the police constable from September, 1917, to October, 1918, and (*b*) the value of the pension granted in October, 1918, on the ground of permanent incapacity pursuant to the Police Act, 1890, and the regulations thereunder. The learned judge who tried the case decided in favour of the plaintiff corporation and awarded damages under both heads. Bradford, of course, is subject to the Municipal Corporations Act, 1882, and no Special Act is referred to in the report as affecting the points in dispute. The plaintiffs' counsel apparently framed their arguments on the assumption that the police constable was

(1) 6 Q. B. D. 287.
(2) [1909] 2 K. B. 776.
(3) 3 E. & E. 672.
(4) [1920] 2 K. B. 135.

the servant of the plaintiff corporation. I am not concerned with that case so far as it touches the question of remoteness of damage. It is obvious, however, that the point I am dealing with to-day might there have been raised by the defendant. But no such point was even mentioned to the learned judge, nor was there any reference to the authorities referred to in my present judgment. *Stanbury's* case (1) was not cited. The learned judge, therefore, never even considered the point that is now before me for decision. It may be that the *Bradford Corporation* case (2) can be supported on a special ground. The claim rested on the old rule that a master has some sort of property in the service of one who is a servant, or even a quasi servant. The rule is a highly artificial one. The action, for example, by a father for the seduction of a daughter is based upon that rule. It may well be pointed out that the claim of a father to the service of a grown-up daughter who happens to be living at home at the time of the seduction and maternity is slender to the last degree. Yet, so slender a claim may afford the basis for an action. The type of action represented in the *Bradford Corporation* case (2) is well discussed by Sir Frederick Pollock in his masterly treatise on Torts, 13th ed., pp. 231 to 240, and by Clerk and Lindsell on Torts, 8th ed., pp. 201 to 208. The *Bradford Corporation* case (2) may perhaps, therefore, be supported as resting on a special and extremely artificial form of action. But I cannot regard it as in any way a decision that the normal relation of master and servant, or principal and agent, exists between a police officer and the municipal corporation within whose area he acts. So to hold would be contrary, in my view, to statute, to established decision and to sound public policy.

I next turn to another decision which was to some extent relied on by Mr. Tristram Beresford for the plaintiff. I refer to *Wallwork* v. *Fielding*. (3) I need not refer in detail to the facts of that case. An action had been brought in the county court by a police inspector against the watch

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(1) [1905] 2 K. B. 839.
(2) [1920] 2 K. B. 135.
(3) [1922] 2 K. B. 66.

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committee of the corporation of Blackpool for "wages." The plaintiff succeeded in the county court, but failed in the Divisional Court and the Court of Appeal. No point was apparently taken that the action was against the watch committee and not against the corporation. The case really turned upon the defendant corporation's power of suspension under s. 191 of the Municipal Corporations Act, 1882, when read with the provisions of the Police Act, 1919. The point now before me was not, I think, raised at all. I need not refer to the judgment of Lord Sterndale, M.R. There is, however, a sentence of Warrington L.J. which was cited to me by the plaintiff's counsel. The learned Lord Justice said: "The relations are those of employer and employed." (1) This, however, if I may respectfully say so, is only an obiter dictum. The learned Lord Justice had not present to his mind either *Stanbury's* case (2), or any of the authorities already cited by me in this present judgment. He did not mean to deal with such a point as the present. The words, of course, go too far if they are meant to imply that the relation between a corporation and a police officer is the normal relation of master and servant. Only in a special and limited sense can a police officer be said to be in the employ of a municipal corporation. With respect to the action for "wages," as they are called in that case—and I do not forget Schedule 5 of the Municipal Corporations Act—I think the point may well be raised some day whether any such action will lie in so far as it is framed upon an alleged contract of service in the ordinary sense. Any such action may perhaps be more properly brought on a special footing—namely, on the duty of the defendants to pay such sum as is due by virtue of statutory obligation plus a certain degree of contractual relationship: see the decisions neatly referred to in Lumley's Public Health, vol. i., 9th ed., pp. 450, 451, and see also *Hall* v. *Taylor*. (3) It must be remembered that if once it is conceded that an ordinary action for wages can be brought it may well be argued that an ordinary action

(1) [1922] 2 K. B. 74.

(2) [1905] 2 K. B. 839.

(3) (1858) E. B. & E. 107.

for wrongful dismissal would apparently also lie. It is necessary to keep in mind at all times the body of legislation which governs the rights, duties and status of police officers.

I need only say a few words on several other cases cited to me. The case of *Smith* v. *Martin and Kingston-upon-Hull Corporation* (1) has, I think, no relevance. It turned upon the effect of the Elementary Education Acts, 1870 to 1900, in creating the relation of master and servant as between a school teacher and the education authority. Nor does the case of *Glasbrook Bros., Ld.* v. *Glamorgan County Council* (2) throw any real light on the point before me. The case turned on other points.

So far as it goes, the principle of the case of *Hall* v. *Lees* (3) assists the defendants' contention here. But that case is somewhat remote from the present question. The like may be said of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (4); so, too, of *Crisp* v. *Thomas* (5), though the defendants in this present action may rightly say that the remarks of Lord Esher M.R. in that case tend to support their submission to me here on the question of principle.

I have now completed my review of the decisions and the statutory provisions which bear on the serious question before me.

I hold that the defendants are not responsible in law for the arrest or detention of the plaintiff. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn to "preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace." If the local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the

(1) [1911] 2 K. B. 775.
(2) [1925] A. C. 270.
(3) [1904] 2 K. B. 602.
(4) [1909] 2 K. B. 820.
(5) (1890) 63 L. T. 756; 55 J. P. 261.

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arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change. For the reasons given, there must be judgment for the defendant.

*Judgment for defendant.*

Solicitors for plaintiff: *W. A. S. Hellyar & Co.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for J. J. Williams, Oldham.*

J. R.

*Overruled.* CURTIS *v.* WILCOX.
[1948] 2 All E.R. 573.

*Overruled.* CURTIS *v.* WILCOX.
[1948] 2 K. B. 474

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*June* 19.

## GOTTLIFFE *v.* EDELSTON.

*Considered.* BAYLIS *v.* BLACKWELL
[1952] 1 K.B. 154

*Husband and Wife—Ante-nuptial Tort by Husband against Wife—Claim for Damages—Subsequent Marriage of Plaintiff and Defendant—Wife's separate Property—"Thing in action"—Wife's claim for ante-nuptial Tort—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 12, 24.

Although by s. 12 of the Married Women's Property Act, 1882, a married woman has the same civil remedies for the protection and security of her own separate property as if it belonged to her as a feme sole, and by s. 24 "property" includes a thing in action, nevertheless a right of action for a pure tort which accrued before the marriage of the parties is not a thing in action within the meaning of s. 24, and consequently such right is not part of the wife's separate property.

An unmarried woman sustained injuries through a man's negligent driving, and issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him:—

*Held*, that her right of action was not such a thing in action as would become her separate property within the meaning of the Act, but was barred by the general disability of husband and wife to sue each other for a tort.

FURTHER consideration of an action tried at Leeds Assizes by McCardie J., sitting without a jury.

The plaintiff, Esther Gottliffe, on January 14, 1929, by her father as next friend, commenced an action against the defendant, Harry Edelston, claiming damages for personal injuries caused (as McCardie J. found) by his negligent driving of a motor car on October 13, 1928, in which car the plaintiff was a passenger. McCardie J. assessed the damages at 800*l.* Shortly after the accident the plaintiff and the defendant became engaged, and on April 22, 1929, nearly three months after the issue of the writ, they were married. On May 30, 1929, the plaintiff became of age. At the trial of the action McCardie J. allowed the defendant to amend his defence by adding the plea, "That the above named Esther Gottliffe and the above named defendant have, since the issue of the writ in this action, intermarried, and are now husband and wife." It was admitted that the real defendant in the action was the insurance company with which the defendant was insured.

*A. S. Diamond* for the plaintiff.

*C. J. Frankland* for the defendant.

*Cur. adv. vult.*

1930. June 19. McCARDIE J. read the following judgment: This action calls, in striking fashion, for a review of the legal results that follow from marriage in England at the present day. The points at issue are unusual in their legal and historical interest. Very singular circumstances give rise to novel and important questions of law.

I will first state the facts apart from the complicating circumstances. In January, 1929, an action was begun in the Leeds District Registry by Esther Gottliffe (then an infant suing by her father as next friend) against Mr. Harry Edelston, who is a medical man, for damages caused by the negligent management of a motor car. The action came for trial before me at the last Leeds Assizes without a jury. On the evening of October 13, 1928, the plaintiff was a passenger in the defendant's motor car. They were going from Wakefield towards Leeds along the Pontefract road. They reached a somewhat steep descent called Gaunt's Hill. It was a dark and unlit road. The defendant had dimmed his lights as he was on the crest of the hill, and for some reason kept them dimmed as he ran down the hill at the rate of about twenty-five miles per hour. He was on his proper side of the road. On the same side as the defendant was a horse and cart. A man was leading the horse. At the back of the cart was another horse attached by a rope to the cart. There was a red light at the rear of the cart. The defendant admitted that even with his lights dimmed he was able to see objects ten yards ahead of his motor car. Yet he ran straight into the horse which was walking at the rear of the cart. The defendant tried to swerve to his right just as he was about to strike the horse. As a result of this unfortunate occurrence the defendant's car was somewhat badly damaged. The windscreen was broken and a piece of glass flew into the plaintiff's left eye. The eyeball was perforated, and she suffered from shock and some minor injuries. There can be no doubt that the defendant was guilty of negligence. His counsel did not dispute it. In my view, the defendant was driving at too great a speed under the circumstances. He was not keeping a proper lookout. As he himself said in cross-examination: "The truth of the matter is that I was talking to the young lady, and, therefore, I did not notice the horse or cart." I should here mention that at the date of the accident the plaintiff and the defendant had conceived a regard for each other. They were in the glamour of that period which precedes the romantic severity of a formal engagement. The result of the accident was serious. The plaintiff suffered intense pain from the injured eye, and in spite of medical treatment it was found necessary to wholly remove it. This operation was carried out on October 25. I need only say a few words as to damages. The plaintiff suffered some special damage by loss of employment, which I need not detail, but the main fact is that she is deprived for life of the sight of one eye. I have considered all the circumstances of the case, and I assess the damages at the sum of 800*l*.

Now, the facts which give rise to the legal problems are these. The accident, as I said, took place in October, 1928. Shortly after the accident the parties became engaged to marry. The writ was issued on January 14, 1929, and the statement of claim was delivered on March 21, 1929. On April 21, 1929, that is nearly three months after the writ, the plaintiff and the defendant married one another. The plaintiff reached twenty-one years of age on May 30, 1929. The defence in the action was delivered on July 4, 1929. It merely denied negligence. Early in March of the present year, however, the defendant gave notice that he would apply at the hearing for leave to amend his defence by adding the following plea: "That the above named Esther Gottliffe and the above named defendant have, since the issue of the writ in this action, intermarried, and are now husband and wife." At the trial I allowed this amendment. The plaintiff's counsel offered no objection to it. This added defence is not like the old plea in abatement. (As to which see Bullen & Leake on Pleading, 3rd ed., 1868, p. 473, and per Lord Sumner in *Edwards* v. *Porter*. (1)) It is, in substance, a plea in bar. Such are all the facts that I need mention. Before, however, I deal with the questions of law I ought, perhaps, to mention two other circumstances. First, that the plaintiff and the defendant are living happily together on friendly terms as man and wife. Secondly, that the explanation of the continuance of this action by wife against husband is to be found in the modern practice of insuring against motor accidents. It was frankly stated at the trial that the interests of an insurance company depend on the result of this action by wife against husband. Hence the obligation unavoidably placed upon me to decide the questions at issue.

Now, the main question for decision is whether or not the marriage of the plaintiff to the defendant destroyed the cause of action possessed by the plaintiff when a spinster. It might well be thought that such a question could not arise at the present day. So great, however, is the confusion of the law that the point is, in my view, one of some doubt and difficulty. It calls for a consideration of legal history, of theological influence, of ambiguous decision and of obscurely worded legislation. The state of the law to-day as to the relations of husband and wife seems to me to be fraught with inconsistency and injustice.

This action happens to be by wife against husband, but it is not outside the questions before me to say a few words on the position of a husband at the present day. They have a bearing on the main point at issue. Wives, however wealthy of purse or independent of character, possess powers and privileges which are wholly denied to husbands Husbands are placed under burdens from which wives are free. Thus a husband living with his wife is liable to pay income tax upon her income, even though she may refuse to contribute anything to the household expenses. If he does not pay the tax he may be sent to prison till he is able (if ever) to find the necessary money. No method whatever seems to be provided for enabling the husband to recoup himself from the wife. Again, a husband is liable for any tort his wife may commit provided it is not connected with a contract: see *Edwards* v. *Porter*. (1) It matters not whether the tort be negligence, slander, trespass or assault. Thus she may be driving a motor car against his express request. She may, by her negligence, cause damage to a third person to the extent of thousands of pounds. For this damage the husband can be sued, whether the wife be joined or not as a defendant. Judgment may be given against him for the damages, and upon that judgment he may be made bankrupt. He has no right whatever to claim any part of the damages from his wife, even though she be possessed of a large private fortune of her own. A wife, on the contrary, is not liable for her husband's tort, unless she authorized or joined in it. Nay more, if the wife threatens to commit a tort which may inflict a heavy burden on a husband he has no right whatever to apply to the Court to prevent her from doing the wrongful act. The husband is helpless: see *Webster* v. *Webster*. (2) Again, if a husband wrongfully converts to his own use the goods of his wife she may bring an ordinary action against him for public trial in the courts: see *Larner* v. *Larner*. (3) But if a wife wrongfully converts to her own use the goods of her husband the only remedy of the husband, so far as he has any remedy at all, is to apply to the Court under the special provisions of s. 17 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). By way of a final illustration of the many curious phenomena of the law, I may mention that

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(1) [1925] A. C. 1, 41.

(1) [1925] A. C. 1.
(2) [1916] 1 K. B. 714.
(3) [1905] 2 K. B. 539.

a husband may be liable for what are called "necessaries" for his wife, even though his wife's income largely exceeds his own and even though she refuses to pay a penny towards the expenses of the joint home: see Lush on the Law of Husband and Wife, 3rd ed., p. 390. The above and many other aspects of injustice spring from the fact that the various changes in favour of married women have not been accompanied by the adjustments that were needed to secure a proper and adequate code for the regulation of the relations between the spouses. There is truth as well as acuteness in the observation of Lord Sumner in *Edwards* v. *Porter* (1), that "Generally speaking, the Act of 1882 was a Married Women's Property Act, not a Married Man's Relief Act."

Now the main question here is whether the wife can sue the husband for his ante-nuptial tort. The broad contentions of the defendant are these: first, that at common law no such action is possible; secondly, that no such action is permitted by the Married Women's Property Act, 1882. I take the position at common law. It is clear that at common law no such action will lie. In substance the defendant submits that for the purpose of this litigation the law still deems husband and wife to be one. This doctrine of unity seems to have been recognized by Bracton so early as the thirteenth century. That learned writer said (Bk. v., cap. 25, para. 10): "[Vir et uxor] sunt quasi unica persona, quia caro una et sanguis unus," which means that in substance they are one person, one flesh, one blood. Sir Edward Coke, in the early part of the seventeenth century, in his Coke upon Littleton 112A (s. 168), cites Bracton, and declares in plain words: "[The husband and wife] be but one person in the law." That was written more than 300 years ago, and from then till the present time the doctrine of unity has led to innumerable complexities. It is not easy to discover the original basis of the doctrine as a common law principle. One of the best known writers on English law, Blackstone J., said in 1765 (Blackstone's Commentaries, Bk. I., cap. 15 (I.), p. 433): "Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law." See also per Lord Stowell in *Lindo* v. *Belisario.* (1) It may in any event be said that since the Marriage Act, 1836 (6 & 7 Will. 4, c. 85), which by s. 21 permitted marriage before a registrar, the civil aspect has greatly predominated: see Eversley on Domestic Relations, 4th ed., pp. 4, 18. This civil aspect is emphasized in a singular manner by the commercial and often sordid considerations which continue to mark the ordinary action in our courts for breach of promise to marry. There can be, I suppose, no doubt that theological considerations framed or deepened the common law doctrine of unity. As Professor Westermarck points out in his masterly History of Human Marriage, 5th ed., vol. iii., p. 331, it seems clear that the doctrine of the Western Church profoundly influenced the secular views of the countries in which she was established for so long a time. I find it difficult to see how the old and conventional doctrine of unity can be said to operate at the present day. There is, of course, no physical unity, save in the most limited and occasional sense. There is no mental unity in any just meaning of the word. Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities. Moreover, as Lord Bryce has said, the modern notion is that it is one's right to assert one's own individuality: see Lord Bryce's Studies in History and Jurisprudence, vol. ii., pp. 459, 463. We are probably completing the transition from the family to the personal epoch of woman. Upon the grave and delicate matter of spiritual unity it need only be pointed out that husband and wife may belong to different sects, or even to different creeds. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), moreover, carries with it many implications, and the recent decision of the Court of Appeal, in *Nachimson* v. *Nachimson* (2), as to Russian

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(1) [1925] A. C. 1, 38.

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(1) (1795) 1 Hag. Cons. 216, 230, 231.

(2) [1930] P. 217.

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marriages, is most significant. It has also to be remembered, as pointed out in the House of Lords, that although we are a Christian nation, yet Christianity is no part of the actual common law of England: see per Lord Sumner in *Bowman* v. *Secular Society.* (1)

But in spite of all this the fact remains that marriage creates a most important status and one which should create also a substantial identity of social and other interests between husband and wife. Hence there seems to be a sound sociological basis for the view of the law that in certain respects there should be a presumption of modified unity between husband and wife. In *Wennhak* v. *Morgan* (2) Manisty J. said that the foundation of the rule I have been discussing was public policy. In *Edwards* v. *Porter* Lord Cave put it somewhat differently when he said (3): "I think that when the older authorities are examined it becomes clear that the true explanation of the rule is to be found in that legal unity between husband and wife which existed when the rule was formulated, and which in those days rendered it inconceivable to a lawyer that a married woman should sue or be sued alone." The doctrine of legal unity was strikingly illustrated in 1876 in the case of *Phillips* v. *Barnet.* (4) There it was held that a wife, after being divorced by her husband, could not sue him for an assault committed upon her during marriage. Blackburn J. said (5): "I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person." Lush J. said (6): "Now it is a well established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense."

Such were the views expressed in 1876. Even at that time the doctrine of unity had suffered great erosion. The criminal law provided necessary exceptions, and hence a wife could prosecute her husband for inflicting bodily injury upon her. The husband's original right of chastisement was gradually modified and doubted. Blackstone's Commentaries (Bk. I., cap. 15, vol. i., p. 444) says: "The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement." See also Bacon's Abridgment, tit. "Baron and Feme," s. B. It was not till 1891 that this right was definitely declared by the Court of Appeal to be non-existent: see *Reg.* v. *Jackson.* (1) That was a striking rejection of the statement in Blackstone (Bk. I., cap. 15, vol. i., p. 442): "By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." The common law, moreover, made other exceptions to the rule. Thus, although publication of a libel by a husband to his wife is no sufficient publication on which to found an action—*Wennhak* v. *Morgan* (2)—yet if a third person publish to either husband or wife a statement defamatory of the other spouse there is a sufficient publication: *Wenman* v. *Ash.* (3) As Maule J. said in the latter case (4): "For many purposes [husband and wife] are essentially distinct . . . . persons." But although separate persons for many purposes, neither can take criminal proceedings against the other for defamatory libel: *Reg.* v. *Lord Mayor of London.* (5)

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(1) [1917] A. C. 406, 464.

(2) (1888) 20 Q. B. D. 635, 639.

(3) [1925] A. C. 1, 9.

(4) (1876) 1 Q. B. D. 436.

(5) Ibid. 438.

(6) Ibid. 440.

Perhaps, however, the most striking encroachment on the common law was made by the Courts of equity. As Lush J. said in his Law of Husband and Wife, 3rd ed., p. 126: "For more than two centuries the stringency of the common law rule that the wife's existence was merged in that of her husband, and that whatever property she might be possessed of upon her marriage, or become possessed of during the marriage, belonged, by the *jus mariti*, to him, has been broken in upon by the creation and growth of the 'separate use.'" This statement by Lush J. indicates a long chapter in legal history. The doctrine of "separate use" led to the doctrine of "separate estate," and later to the modern phrase of "separate property." Equity invented the doctrine of separate estate in order to mitigate the severity of the common law with respect to the husband's rights over the property of his wife: see Eversley on Domestic Relations, 4th ed., p. 326. For the protection of separate property a large number of actions have been brought on the Chancery side by married women against their husbands. I need not further illustrate the divers voices with which the law has spoken with respect to the so-called unity of husband and wife. For many purposes they are different persons—for many purposes they are one person. It is at all events clear beyond doubt that, apart from the legislation to which I must now refer, the present plaintiff could not sue her husband in the present action.

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(1) [1891] 1 Q. B. 671.

(2) 20 Q. B. D. 635.

(3) (1853) 13 C. B. 836.

(4) Ibid. 844.

(5) (1886) 16 Q. B. D. 772.

Now if the common law does not here permit the plaintiff to sue, there arises the question whether or not she is entitled to sue by the provisions of any Act of Parliament. The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), do not affect the matter. The relevant enactments must be found in the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). Sect. 1 of that Act (so far as material) is as follows: Sub-s. 1: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee." Sub-s. 2: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." Sect. 2: "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage." Sect. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." Sect. 17 provides as to the settlement between husband and wife of questions with respect to the title to or possession of property. Sect. 24 (the definition clause) says: ". . . . The word 'property' in this Act includes a thing in action." Such are the only provisions I need set out. The Act has given rise to incessant litigation. It is ambiguous and obscure. As Lord Esher said in *In re Armstrong* (1): "It would not be right to suppose that the legislature when they passed this Act did not understand it, but unquestionably its construction by the Courts presents the most serious difficulties."

The case for the plaintiff is put most ably by Mr. Diamond, as follows. He says: The negligence of the defendant before marriage gave the plaintiff a cause of action against him. This cause of action was what the law calls a "thing in action," and, therefore, a right of property. When the writ was issued, she still possessed that property, and when the defendant married the plaintiff it became her "separate property" within s. 2 of the Act. If, then, so the argument runs, it became her separate property, she was, and is entitled, inasmuch as the present suit is within s. 12 of the Act, to enforce the cause of action against the defendant for the protection and security of that separate property. It is clear, moreover, from *Beasley* v. *Roney* (1) that the damages when recovered will belong to her, and her alone. See also *Weldon* v. *Winslow* (2) and *Lowe* v. *Fox*. (3)

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(1) (1888) 21 Q. B. D. 264, 268.

Such is the argument for the plaintiff, and it calls for consideration. It is well settled that a wife has the widest powers of action for the protection and security of her separate property. See Lush on Husband and Wife, 3rd ed., pp. 513, 515, and so on. For this purpose she may sue either in contract or in tort. Thus she may sue in tort for conversion of her goods by her husband: *Larner* v. *Larner*. (4) The cases go to the utmost extent in favour of the wife, and she may bring every class of action against him, whether for damages or breach of contract or debt, and she may also claim an injunction against him under the most striking circumstances: see *Shipman* v. *Shipman* (5) in the Court of Appeal. But, strangely enough, as Lush J. points out, the Act has nowhere enabled a husband to sue his wife for a tort under any circumstances whatsoever: see Lush on Husband and Wife, 3rd ed., p. 515. It may be said to-day with even more force than it was said by Blackstone 165 years ago: "So great a favourite is the female sex of the laws of England": see Blackstone, Bk. I., cap. 15, p. 445.

Now, it is clear that a wife's remedies extend to all properties she owned at the date of the marriage, as well as to property gained during marriage. Thus she may sue for a debt due from the husband before marriage. But here again an extraordinary state of the law is found, for, though the wife can sue the husband for ante-nuptial debts, yet the husband has no right whatsoever to sue the wife for the debts

(1) [1891] 1 Q. B. 509.
(2) (1884) 13 Q. B. D. 784.
(3) (1885) 15 Q. B. D. 667.
(4) [1905] 2 K. B. 539.
(5) [1924] 2 Ch. 140.

that she owed to him before marriage. Such is the astonishing state of the law: see *Butler* v. *Butler*. (1) He cannot, apparently, even set off such debts against her claims. The wife possesses, as I have said, a wider power of enforcing her rights of separate property. Was, then, her right of action here, existing as it did at the date of the marriage, "separate property" within the Act of 1882, having regard to the definition clause, s. 24, which says that the word "property" in the Act includes a "thing in action"? If it was not separate property within s. 12, then the Act of 1882 gives her no cause of action against her husband. The phrase "thing in action" has often been discussed: see Stroud's Judicial Dictionary, tit. "Chose in action." It is to be remembered that an ordinary cause of action for damages for tort is not within s. 136 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). It cannot be assigned: see, for example, *Defries* v. *Milne*. (2) But s. 136 of the Act of 1925 only relates to the question of assignment. Can it properly be said that a right of action for a tort, for example, negligence or assault, is a thing in action? In some of the well known books it has been so treated: see Brookes' Graunde Abridgement, ed. 1586, tit. "Chose in action," p. 137; Blount's Law Dictionary, 2nd ed., tit. "Chose in action"; Jacobs' Law Dictionary, 5th ed., tit. "Chose in action." The point is treated with full learning by Mr. T. Cyprian Williams in the Law Quarterly Review, vol. x., p. 143, and by the late Mr. Charles Sweet in the same volume, p. 303. Undoubtedly the phrase "thing in action," when taken in its broadest possible sense, may be used to cover such a right as that to bring an action for a pure tort, such, for example, as for negligence or assault. But was the phrase as used at the end of s. 24 of the Married Women's Property Act, 1882, used with so extremely an extended meaning? If so, the consequences would be striking. It would mean that although no husband can sue his wife for any tort whatsoever committed by her against him, whether before or during marriage, yet the wife can sue the husband for every act of tortious wrong against her before marriage, whether it be for negligence, libel, slander or assault. So remarkable a result leads me to the view that the phrase " thing in action " as defined by s. 24 of the Act, was used in a limited sense only. It would cover, no doubt, any debt owed by the husband to the wife, and doubtless it would cover the normal range of his other contractual obligations to her. Perhaps, too, the phrase might cover a case, for example, where the husband had before marriage destroyed or injured the goods of the wife. There the goods would be her " property " in the true sense, and for an ante-nuptial injury to them the husband might perhaps be liable to the wife in an action brought or continued by her after marriage. But the action now before me is not of that character. What the defendant did was not to destroy or injure the plaintiff's property in the ordinary sense, but to infringe upon her right of personal safety and security. This right of personal safety and security was not, I think, her " property " in the normal meaning of that word. Such a right stands on the same footing as rights of character and the like. A somewhat similar point arose in *Reg.* v. *Lord Mayor of London* (1) before Mathew and A. L .Smith JJ. There the wife sought to prosecute the husband for libel after marriage (not affecting her separate estate), and hence that case is very different to the present. But in the course of the judgment of the Court it was said (2): " How can criminal proceedings for a personal libel be said to be for the protection and security of her own separate property ? "; and later the Court said : " What was damaged, if anything, was the fair fame of the applicant, and that, in our judgment, is not separate estate."

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(1) (1885) 14 Q. B. D. 831.

(2) [1913] 1 Ch. 98.

The word " property " in the Act of 1882 and the phrase " thing in action " in s. 24 of that Act must, I think, be read in the light of the general policy of the Act, so far as any policy at all can be inferred from it. The Act conferred no privileges on the husband. It conferred many privileges on the wife. But it is plain, I think, that the framers of the Act did not wish to encourage litigation between spouses.

(1) 16 Q. B. D. 772. (2) 16 Q. B. D. 777.

Such litigation is admittedly unseemly, distressing and embittering. Hence the wording of s. 12 of the Act, as follows: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." These words "except as aforesaid, no husband or wife shall be entitled to sue the other for a tort," are broad and emphatic. The wife is given full power to guard her separate property. But, apart from that separate property, she cannot, I think, sue her husband for any tort whether before or during marriage. The question before me is, I agree, a difficult one. It raises, moreover, many points of serious social consequences. Taking into consideration the scheme and wording of the Married Women's Property Act, 1882, I come to the conclusion that this action before me is not an action for the protection and security of the wife's separate property, and I therefore hold that the claim is barred by the prohibitory words of s. 12 of the Act. It follows, therefore, that judgment must be entered for the defendant husband.

Upon the question of costs I need only say that the amendment of the defence to which I have just given effect was made at the very latest stage only. Moreover, on the merits as distinguished from the technical points, the defendant is wrong, inasmuch as I have found negligence against him. I therefore direct that each party must bear their own costs.

I desire to add a few words only to this somewhat full judgment. I have referred to many decisions. I have, for the purposes of the case, read many more. I have considered with care the intricate provisions of the Married Women's Property Act, 1882. At every point of research, on every aspect of the case, I find nothing but confusion, obscurity

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and inconsistency. I find privileges given to a wife which are wholly denied to a husband, and I find that upon the husband there has fallen one injustice after another. I hope that the day is not far distant when the vital and far-reaching relationship of husband and wife will receive the attention of Parliament. When that day comes I trust that the present features of injustice will be removed, that the existing obscurities will be made clear, and that the great institution of marriage will gain a new dignity and a new strength through a wise and beneficent amendment of the law.

/J /c

*Judgment for defendant.*

Solicitors for plaintiff: *Gisborne & Co., for Carr, Sandelson & Co., Leeds.*

Solicitors for defendant: *P. W. Baster, for J. H. Milner & Son, Leeds.*

W. L. L. B.

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*May* 30.

## COLVILLE ESTATE, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

*Revenue—Income Tax—Super-tax—Assessment—Private Company formed to take over Estate—Mortgages on Estate—Mortgagee principal Shareholder—Article that Profits of Company should be applied in Discharge of Mortgages—No Distribution by the Company to its Members of a Reasonable Part of its Income—Assessment on Company—Express Provision in Subsequent Statute covering Case—Effect on Construction of Earlier Statute worded in General Terms—Whether Assessment ought to be on Whole of Income of Company or on a Reasonable Part—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31.

By s. 21, sub-s. 1, of the Finance Act, 1922: "Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year . . . . distributed to its members . . . . a reasonable part of its actual income from all sources for the said year . . . . the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the

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year or other period specified in the notice, be deemed to be the income of the members. . . . ."

Sect. 31, sub-s. 1, of the Finance Act, 1927, provided that for the purpose of s. 21, sub-s. 1, of the Finance Act, 1922, "any sum expended or applied, or intended to be expended or applied out of the income of the company, otherwise than in pursuance of an obligation entered into by the company before August 4, 1914, . . . . (ii.) in redemption or repayment of any share or loan capital or debt . . . . issued or incurred in or towards payment for any such business, undertaking or property . . . ." should be regarded as income available for distribution among the members of the company.

A private limited company was incorporated in March, 1915, to purchase from Sir H. B. certain freehold and leasehold properties known as the Colville Estate, subject to mortgages owing thereon amounting to 238,000*l.*, which were vested in Sir H. B., who also held all the shares in the company with the exception of two which were held by two directors of the company, who together with Sir H. B. were the directors of the company. The Articles of Association of the company contained an article (No. 95) which provided that "so long as any mortgage or charge affecting any property of the company shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available, of the principal moneys and the moneys secured by any mortgage or charge for the time being outstanding and unsatisfied, unless the company shall by special resolution direct to the contrary." There was also a deed poll executed by Sir H. B. in November, 1915, by which it was provided that the net profits of the company should be applied, without any deduction for interest on mortgage debts to which he was entitled, in the discharge and satisfaction of the principal moneys and interest payable in respect of the mortgage debts mentioned in the schedule to the deed poll, to which Sir H. B. was not beneficially entitled. These outstanding mortgages were afterwards taken over by Sir H. B. No dividends had ever been paid by the company, but the mortgages had been reduced from 238,000*l.* to 186,000*l.*, and the company had also accumulated a reserve fund of 80,000*l.* The Special Commissioners made a direction under s. 21 of the Finance Act, 1922, which was confirmed by the Board of Referees, that for the purposes of assessment to super-tax the actual income from all sources of the company should for the periods ended June 24, 1924, 1925 and 1926 respectively, be deemed to be the income of the members of the company:—

*Held*, that neither art. 95 of the Articles of Association of the company nor the fact that no special resolution had been passed by the company altering the requirements of that article precluded the Special Commissioners from making a direction under s. 21, sub-s. 1, of the Finance Act, 1922, that the company had not distributed a reasonable part of its income to its members, and that therefore the income of the company should for the purposes of assessment to super-tax be deemed to be the income of its members.

Secondly, that the fact that s. 31, sub-s. 1, of the Finance Act, 1927, expressly provided that sums expended or applied in redemption or repayment of any share or loan capital or debt should be regarded as income available for distribution among the members of the company, and therefore in terms applied to the present case, did not prevent such sums being regarded as available for distribution among the members of the company under the general provisions contained in s. 21, sub-s. 1, of the Act of 1922.

Thirdly, that where there has been no distribution by a company among its members of a reasonable part of its actual income, and in consequence a direction has been made by the Special Commissioners under s. 21, sub-s. 1, of the Act of 1922, that the actual income from all sources of the company shall for the purposes of assessment to super-tax be deemed to be the income of the members, the whole of the income of the company, and not merely that part of its income that might reasonably have been distributed by the company among its members, is to be treated as being covered by the direction of the Commissioners.

CASE stated by the Board of Referees pursuant to the Finance Act, 1922, s. 21, First Schedule, and s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

At a meeting of the Board of Referees held on May 15, 1929, for the purpose of rehearing appeals under para. 2 of the First Schedule to the Finance Act, 1922, the Board reheard an appeal by the Colville Estate, Ld., whose registered office was at 49 Russell Square in the County of London (hereinafter called " the company "), against directions made by the Commissioners for the Special Purposes of the Income Tax Acts on April 27, 1928, under s. 21 of the Finance Act, 1922 (1), whereby they directed that for the purposes of assessment to super-tax the actual income from all sources

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(1) Finance Act, 1922, s. 21: " With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows:

" (1.) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to" April 5, 1922, "for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be of the company should for the periods ended June 24, 1924, June 24, 1925, and June 24, 1926, respectively, be deemed to be the income of the members of the company, and the amount thereof should be apportioned among the members.

The company being aggrieved by the said directions appealed against the same to the Special Commissioners, who upon the hearing of the appeal on October 12, 1928, reserved their decision, and on November 6, 1928, determined that the said directions should be confirmed.

The company being dissatisfied with the said determination required the appeal to be reheard by the Board of Referees, and the Board reheard the same accordingly.

On the rehearing before the Board of the said appeal the following facts were admitted or proved:—

(1.) The company was incorporated, as a private limited company under the Companies Acts, 1908 and 1913, on March 17, 1915, with the principal object of entering into an agreement with Sir Hickman Beckett Bacon, Bart. (hereinafter called Sir Hickman Bacon), for the acquisition, under the agreement referred to in art. 4 of the Articles of Association of the company, of hereditaments and premises in various parts of London, Weybridge, Norwood

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deemed to be the income of the members, and the amount thereof shall be apportioned among the members:

"Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business.

"(2.) Any super-tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company. . . . ."

. . . . . .

"(6.) This section shall apply to any company—

(a) which has, since" April 5, 1914 "been registered under the Companies Acts, 1908 to 1917; and

(b) in which the number of shareholders computed as hereinafter provided is not more than fifty; and

(c) which has not issued any of its shares as a result of a public invitation to subscribe for shares; and

(d) which is under the control of not more than five persons."

and Brighton, known as the Colville Estate. The capital of the company was 35,000*l.* in 35,000 shares of 1*l.* each.

(2.) A private unincorporated syndicate was formed in 1879 to take over the Colville Estate, and Sir Hickman Bacon with others took over the liability for the first mortgages on the estate in order to avoid losing the same. A limited company would have been formed in 1905, when Sir Hickman Bacon took over the interests of certain of the other proprietors, but the interested parties were afraid that the mortgagees would then foreclose. In order to carry out the transaction it became necessary for Sir Hickman Bacon with others to enter into direct personal covenants with the mortgagees for payment of over 500,000*l.* No profit or interest was ever drawn by Sir Hickman Bacon.

(3.) The estate consisted principally of freehold and leasehold houses of from 60 to 80 years old, many of which had in the past been converted into flats. As regards the leasehold properties of the company, out of 183 properties the leases of 7 expired between 1940 and 1950, of 88 between 1950 and 1960, of 84 between 1960 and 1970, and 4 between 1970 and 1980.

(4.) By art. 95 of the original Articles of Association of the company it was provided as follows:

"95. So long as any of the mortgages or charges specified in the said agreement mentioned in clause 4 hereof shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available, of the principal moneys and interest, and the moneys secured by the said mortgages or charges for the time being outstanding and unsatisfied, unless the company shall by special resolution direct to the contrary."

(5.) By special resolution of the company duly confirmed on November 10, 1924, the following article was substituted for the said art. 95—namely:

"95. So long as any mortgage or charge affecting any property of the company shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available, of the principal moneys and the moneys secured by any mortgage or charge for the time being outstanding and unsatisfied, unless the company shall by special resolution direct to the contrary."

(6.) By art. 70 of the said Articles of Association it was provided as follows:

"70. Until otherwise determined by a general meeting the number of directors shall not be less than two or more than three. The persons hereinafter named shall be the first directors, that is to say, Sir Hickman Beckett Bacon and the Hon. Edward Gerald Strutt."

(7.) A print of the said Memorandum and Articles of Association of the company containing the said special resolution was annexed to and formed part of the case.

(8.) At all material times the directors of the company were Sir Hickman Bacon and the said Hon. Edward Gerald Strutt, with the addition since February 16, 1923, of Edward Jolliffe Strutt. Board meetings were held from time to time for the purpose of transacting the business of the company. Copies of the minutes of the company were annexed to and formed part of the case.

(9.) The shares of the company during the three years in question were held as follows:—

| *To June* 24, 1925. | *Share of* 1*l. each fully paid.* |
|---|---|
| Sir Hickman Bacon . . . . | 4943 |
| Hon. Edward Gerald Strutt . . | 1 |
| Edward Jolliffe Strutt . . . | 1 |
| | 4945 |

| *To June* 24, 1926. | |
|---|---|
| Sir Hickman Bacon . . . . | 9833 |
| Hon. Edward Gerald Strutt . . | 1 |
| Edward Jolliffe Strutt . . . | 1 |
| | 9835 |

(10.) By the sale agreement referred to in para. 1 of the facts set out above Sir Hickman Bacon agreed to sell to the company the freehold and leasehold properties scheduled to the said agreement, subject to mortgages owing thereon amounting to 238,057*l*. The consideration for the sale was 4943*l*. in fully paid shares of the company, the company undertaking the liability for the mortgage moneys and interest, and indemnifying the vendor in respect thereof. A print of the said agreement dated March 24, 1915, incorporating notes, showing certain subsequent dealings with the properties, was annexed to and formed part of the case.

(11.) By deed poll, dated November 15, 1915, executed by Sir Hickman Bacon, it was recited that at the date of the said agreement and the said deed poll Sir Hickman Bacon was beneficially entitled to the several mortgage debts and moneys owing upon the security of the premises described in the first and second schedules to the said agreement, save and except such of the mortgage debts and moneys as were specified in the schedule to the deed poll, and also that it was intended that the said agreement should have contained a provision that he was not to be entitled to claim or have paid to him any interest on the several mortgage debts and sums of money to which he was beneficially entitled as aforesaid, or on any moneys he might pay or provide in discharge or part discharge of any of the mortgage debts mentioned in the schedule to the deed poll, until the whole of the principal money in respect of the mortgage debts mentioned in the said schedule was discharged; the intent being that as far as possible the net profits of the company, without any deduction for interest on mortgage debts to which he was entitled, should be applied in the discharge and satisfaction of the principal moneys and interest payable in respect of the mortgage debts mentioned in the said schedule; and Sir Hickman Bacon agreed that he would waive all claims to be paid any interest on the mortgage debts so as aforesaid vested in him beneficially, and also on any moneys he had paid or might pay or provide in discharge or part discharge of any of the mortgage debts mentioned in the schedule to the said deed poll, until the whole of the principal moneys in respect of the mortgage debts mentioned in the schedule to the said deed poll had been discharged, it being understood that the company would, as was intended, apply as far as possible the net profits of the company in the discharge and satisfaction of the principal moneys and interest payable in respect of the mortgage debts mentioned in the schedule to the deed poll. A copy of the deed poll was annexed to and formed part of the case.

(12.) An account taken from the books of the company showing the reductions from time to time made by the company of the said mortgages, amounting to 238,057*l.* at the date of the said agreement, was annexed to and formed part of the case. As appeared from that account the mortgages were by June 24, 1926, reduced by payments off to 186,000*l.*

(13.) The company was not formed to deal in property nor had it in fact done so. It had devoted itself to the management of the Colville Estate; but the company had from time to time sold certain of its freehold and leasehold properties, and had where possible purchased the freehold of premises which it already held on lease. The company had only purchased one freehold property which it did not already hold on lease. The statement marked J., annexed to and forming part of the case, showed in a summarized form the company's capital transactions in house properties, and the balance at the end of each financial year after deducting a sum described as depreciation. The statement also showed this deduction as a percentage on the said balances. The statement showed that the total cost of property purchased by the company up to June 24, 1926, was 12,262*l.*, while the total sum realized in respect of property sold by the company up to the said date was 41,114*l.*

(14.) An abstract of the balance-sheets and revenue accounts of the company from 1915 to 1927 was annexed to and formed part of the case. The material items in the abstract were summarized as follows :—

### BALANCE SHEET.

| | LIABILITIES. | | | | ASSETS. | | | |
|---|---|---|---|---|---|---|---|---|
| Year. | Creditors. | Mortgages. | Reserve. | Capital. | Cash. | Debtors. | Investments. | Estate (net). |
| 1915 | 11,035 | 226,262 | 3,464 | 4,945 | 1,207 | 8,502 | — | 235,972 |
| 1916 | 11,232 | 220,297 | 6,636 | 4,945 | 4,014 | 7,129 | — | 231,944 |
| 1917 | 10,813 | 215,307 | 8,947 | 4,945 | 4,526 | 7,214 | — | 228,249 |
| 1918 | 9,450 | 213,707 | 12,757 | 4,945 | 5,036 | 6,588 | 5,000 | 224,212 |
| 1919 | 12,339 | 212,107 | 8,180 | 4,945 | 3,345 | 4,028 | 10,000 | 220,175 |
| 1920 | 11,565 | 208,407 | 6,907 | 4,945 | 4,297 | 4,116 | 29,594 | 193,794 |
| 1921 | 11,834 | 208,407 | 7,333 | 4,945 | 1,648 | 10,164 | 36,966 | 183,718 |
| 1922 | 10,788 | 208,407 | 17,275 | 4,945 | 15,051 | 6,236 | 42,005 | 178,100 |
| 1923 | 12,345 | 200,907 | 22,010 | 4,945 | 8,932 | 5,715 | 51,899 | 173,638 |
| 1924 | 10,025 | 198,407 | 31,368 | 4,945 | 7,983 | 6,028 | 61,963 | 168,751 |
| 1925 | 7,778 | 196,407 | 45,777 | 4,945 | 6,500 | 9,072 | 75,451 | 163,864 |
| 1926 | 8,495 | 186,000 | 62,820 | 9,835 | 13,170 | 9,539 | 81,718 | 162,722 |
| 1927 | 4,088 | 167,000 | 80,460 | 6,835 | 8,153 | 8,575 | 87,719 | 156,935 |

### REVENUE ACCOUNT.

| | REVENUE. | | | EXPENDITURE. | | BALANCE. | |
|---|---|---|---|---|---|---|---|
| Year. | Net Rentals. | Interest. | Mortgage Interest. | Repairs. | Depreciation. | Deficit. | Surplus. |
| 1915 | 29,749 | — | 5,426 | 5,965 | 4,028 | — | 3,464 |
| 1916 | 27,527 | 37 | 5,116 | 5,389 | 4,030 | — | 3,172 |
| 1917 | 27,357 | 124 | 2,599 | 7,484 | 4,037 | — | 2,311 |
| 1918 | 28,228 | 174 | 879 | 7,571 | 4,037 | — | 3,810 |
| 1919 | 29,083 | 427 | — | 16,678 | 4,037 | 4,577 | — |
| 1920 | 31,609 | 727 | 812 | 16,078 | 4,037 | 1,273 | — |
| 1921 | 31,622 | 1,227 | 471 | 17,868 | 4,037 | — | 426 |
| 1922 | 37,206 | 1,893 | — | 14,438 | 4,037 | — | 9,943 |
| 1923 | 36,801 | 1,434 | — | 17,118 | 4,037 | — | 4,734 |
| 1924 | 37,678 | 2,253 | — | 15,080 | 4,037 | — | 9,358 |
| 1925 | 38,712 | 2,753 | — | 12,030 | 4,037 | — | 14,409 |
| 1926 | 38,795 | 3,436 | — | 11,213 | 4,037 | — | 17,043 |
| 1927 | 39,089 | 3,717 | — | 11,284 | 4,037 | — | 17,639 |

(15.) No dividend had ever been paid by the company. The surplus shown in the above mentioned revenue accounts was in each year credited to the reserve shown in the above mentioned balance-sheets, and the deficit shown in the above mentioned revenue accounts in 1919 and 1920 was debited to the said reserve. The investments shown in the above mentioned balance-sheets consisted at all material

dates of either 5 per cent. National War Bonds, 4 per cent. Victory Bonds, 5 per cent. War Loan, 5½ per cent. Treasury Bonds, 3½ per cent. Conversion Loan Bearer Bonds, or 3½ per cent. Conversion Loan Registered Stock.

(16.) The reason for the cessation of mortgage interest was that all the outstanding mortgages had since 1921 been taken over by Sir Hickman Bacon. About the end of 1924 the properties upon which the outstanding mortgages were secured were conveyed to the company in accordance with the resolutions recorded in the minutes of the general meeting of November 10, 1924. The deed of conveyance was registered at the Land Registry, and certificates of absolute title in respect of the freehold property, and certificates of good leasehold title in respect of the leasehold property, which had been mortgaged, were issued to the company by the Land Registry. The said certificates were deposited with Sir Hickman Bacon as security for the payment of the amount outstanding in respect of the said mortgages at the date of the deed of conveyance, and the charge thereby created had been duly registered in favour of Sir Hickman Bacon. This transaction was completed before the general meeting of February 16, 1925, at which the balance-sheet for the year ending June 24, 1924, was presented. Repayments had from time to time been made to Sir Hickman Bacon on account of the outstanding mortgages or the debt secured by such charge. The repayments to Sir Hickman Bacon during the material periods, particulars of which were shown in the account of mortgages, were as follows:—

| | | | |
|---|---|---|---|
| Year ended June 24, 1924 . . . | £2,500 | 0 | 0 |
| ,, ,, ,, 1925 . . . | 5,000 | 0 | 0 |
| ,, ,, ,, 1926 . . . | 10,406 | 17 | 2 |
| | £17,906 | 17 | 2 |

(17.) Full copies of the balance-sheets and revenue accounts of the company were annexed to and formed part of the case.

(18.) At the present time the rents receivable from the company's properties were :—

| | |
|---|---|
| Rack-rents of leaseholds let on full repairing leases . . . . . . . | £7,993 |
| Rack-rents of leaseholds not let on full repairing leases . . . . . . . | 13,145 |
| Rack-rents of freeholds let on full repairing leases . . . . . . . | 7,143 |
| Rack-rents of freeholds not let on full repairing leases . . . . . . . | 15,100 |
| Total rack-rents excluding 44 ground rent lets . | £43,381 |

At the rehearing of the appeal evidence was given by Mr. Edward Jolliffe Strutt, one of the managing directors of the company, and Mr. Charles Gerald Eve, partner in the firm of Thurgood, Martin & Eve, chartered surveyors, whose firm had acted for the estate since 1909, and who had personally known it for the last ten years, and who, at times during February, 1929, had refreshed his acquaintance with the properties on the estate. The evidence of these witnesses consisted of the written statements submitted to the Board, which were taken as being evidence given at the hearing, and of their oral evidence recorded by the shorthand writer. These documents were annexed to and formed part of the case.

It was contended before the Board of Referees on behalf of the company that the directions appealed against should be discharged on some or all of the following grounds :—

(*a*) That art. 95 of the Articles of Association of the company precluded the company from paying a dividend, and that it was an implied term of the contract for sale of the properties by Sir Hickman Bacon to the company that such article should form one of the Articles of Association of the purchasing company;

(*b*) That so long as art. 95 remained an article of the company, and Sir Hickman Bacon as the largest shareholder insisted on his right not to vote for a special resolution, the final words of art. 95 had no practical effect.

(*c*) That the introduction of s. 31, sub-s. 1, into the Finance Act, 1927 (1), was relevant, and ought to be interpreted as showing that prior to that section coming into operation it was not intended by the Legislature that money applied in payment for an undertaking or in redemption or repayment of any loan capital or debt in such circumstances as the present case, was available for distribution to the members within the meaning of s. 21 of the Finance Act, 1922.

(*d*) That the special fact of the identity of the mortgagee with the controlling shareholder was in the circumstances immaterial in considering whether the money applied in repayment of the mortgages was available for distribution by the company.

(*e*) That the current requirements of the company's business, and the maintenance and development of the company's business made it necessary or advisable that dividends should not be paid for the periods in question.

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(1) Finance Act, 1927, s. 31, sub-s. 1: "Sub-section 1 of s. 21 of the Finance Act, 1922, shall have effect as if at the end thereof there were added as a new paragraph the following:—

"For the purpose of this sub-section any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business, that is to say:—

"(*a*) Any sum expended or applied, or intended to be expended or applied, out of the income of the company, otherwise than in pursuance of an obligation entered into by the company before" August 4, 1914—

"(i.) in or towards payment for the business, undertaking or property which the company was formed to acquire or which was the first business, undertaking or property of a substantial character in fact acquired by the company; or

"(ii.) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred in or towards payment for any such business, undertaking or property, or issued or incurred for the purpose of raising money applied or to be applied in or towards payment thereof; or

"(iii.) in meeting any obligations of the company in respect of the acquisition of any such business, undertaking or property:

"(*b*) Any sum expended or applied, or intended to be expended or applied, in pursuance or in consequence of any fictitious or artificial transaction:"

(*f*) That on the construction of s. 21, sub-s. 1, of the Finance Act, 1922, the " said income " which was to be the subject-matter of the direction referred to, meant the " reasonable part of its actual income from all sources " previously therein referred to, and not the whole income for the year or other period in question as therein referred to, and that the Board of Referees, if satisfied that liability attached in respect of any of the three years in question, should have proceeded to inquire to what reasonable part of the actual income for the year in question liability would attach.

The following cases were referred to : *Salomon* v. *Salomon & Co.* (1) ; *Borland's Trustee* v. *Steel Brothers & Co.* (2) ; *Inland Revenue Commissioners* v. *Sansom* (3) ; *David Carlaw & Sons, Ld.* v. *Inland Revenue Commissioners.* (4)

The Board of Referees did not call upon the representative of the Crown to reply, but dismissed the appeal and confirmed the directions made by the Special Commissioners on April 27, 1928, as aforesaid.

Immediately upon the Board so determining the appeal the company expressed its dissatisfaction with the determination of the Board as being erroneous in point of law, and in due course required the Board under the Finance Act, 1922, s. 21, and First Schedule, and s. 149 of the Income Tax Act, 1918, to state a case for the opinion of the High Court.

As a matter of construction of the Finance Act, 1922, the Board of Referees held :—

(1.) That neither the fact that the Articles of a company required a special resolution as a condition precedent to the declaration of a dividend, nor the fact that there was not a sufficient majority of shareholders willing to vote for such a resolution, precluded the Board from holding that the company had not distributed a reasonable part of its income within the meaning of s. 21.

(1) [1897] A. C. 22.

(2) [1901] 1 Ch. 279.

(3) [1921] 2 K. B. 492.

(4) 1926 S. C. 870; 11 Tax Cas. 96.

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COLVILLE ESTATE, LD. v. INLAND REVENUE COMMISSIONERS.

(2.) That the existence of a contract between a company and some other party restricting the liability of the company to distribute profits by way of dividend did not preclude the Board from holding that the company had not distributed a reasonable part of its income within the meaning of s. 21.

(3.) That if the Board held that the company had failed to distribute a reasonable part of its income within the meaning of s. 21, the Board were not required to decide what amount would have been a reasonable part.

The Board of Referees found the following facts :—

(1.) The circumstances were not at any time such as to make it reasonable for the company to agree not to declare a dividend until the debts scheduled to the deed poll had been discharged.

(2.) The actual value of the properties at the end of each of the financial years 1924, 1925 and 1926 was very largely in excess of the value as shown in the respective balance-sheets for those years, and as regards each year the company could have declared a substantial dividend without endangering the ability of the company to meet any expenditure likely to be required for reconstruction.

(3.) As regards each of the years 1924, 1925 and 1926, even if the amounts applied in repayment of debt were regarded as not available for distribution the company did not within a reasonable time distribute to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for such year.

The questions of law for the opinion of the Court were :—

1. Whether the Board of Referees were precluded from holding that the company had failed to distribute a reasonable part of its income, within the meaning of s. 21 of the Finance Act, 1922, by reason of art. 95 and the fact that no special resolution had been passed, or by reason of the existence of an implied contract as set forth in para. (*a*) of the contentions on behalf of the company.

2. Whether the introduction of s. 31, sub-s. 1, of the Finance Act, 1927, had the effect contended for on behalf of the company as set out in para. (*c*) of their contentions, and, if so, whether, having regard to the findings of fact of the Board, that section was material.

3. Whether the construction of s. 21, sub-s. 1, of the Finance Act, 1922, contended for on behalf of the company, as set out in para. (*f*) of their contentions, was correct in law, and, if so, whether the case should be remitted to the Board to determine what was a reasonable amount for the company to distribute.

4. Whether there was evidence upon which the Board could hold that the company had failed to distribute a reasonable part of its income within the meaning of s. 21 of the Finance Act, 1922.

*E. G. Palmer* for the company. The Board of Referees were wrong in holding that the fact that art. 95 of the Articles of Association required a special resolution as a condition precedent to the declaration of a dividend and that no special resolution had been passed did not preclude them from holding that the company had not distributed a reasonable part of its income within the meaning of s. 21 of the Finance Act, 1922. In so holding the Board of Referees were confusing the identity of the company with that of Sir Hickman Bacon, the principal shareholder in the company. It was laid down by the House of Lords in *Salomon* v. *Salomon & Co.* (1) that a company is a separate entity from its corporators. Lord Halsbury L.C. said (2): "Once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." Lord Macnaghten also said (3): "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation

(1) [1897] A. C. 22.

(2) [1897] A. C. 30.

(3) [1897] A. C. 51.

the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them." Sir Hickman Bacon sold his interest in the property for a number of shares in a company the Articles of Association of which included art. 95, and he is entitled to insist upon the mutual covenant therein contained. Farwell J. said in *Borland's Trustee* v. *Steel Brothers & Co.* (1): " A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount." Those remarks show the significance of art. 95 of the Articles of Association which was part of the bargain on which the property was sold to the company. Sir Hickman Bacon was entitled to insist upon his rights under art. 95 without it being said that the company had not distributed a reasonable part of its income. The Special Commissioners and the Board of Referees have sought to merge Sir Hickman Bacon in the company, but this cannot be done. In *Shuttleworth* v. *Cox Brothers & Co.* (*Maidenhead*) (2) the Articles of Association of a company provided that the plaintiff and four others should be the first directors of the company, and that they should be permanent directors, and should hold office for life unless disqualified from any one of six specified events. Subsequently the company passed a special resolution and altered the articles by adding a seventh event disqualifying a director, under which the plaintiff became disqualified. The plaintiff alleged that there had been a breach of contract contained in the original articles, but it was held that the

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(1) [1901] 1 Ch. 279, 288.

(2) [1927] 2 K. B. 9.

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contract between the plaintiff and the company contained in the articles in their original form was subject to the statutory power of alteration by special resolution and that consequently the plaintiff could not succeed. On the other hand in *Nelson* v. *James Nelson & Sons, Ld.* (1), the Articles of Association of the company provided that the board of directors might appoint one of their number to be managing director for such period as they deemed fit, and might revoke the appointment. The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold office so long as he remained a director of the company, retained his due qualification, and efficiently performed the duties of his office. Subsequently the board revoked the appointment, and it was held that the Articles of Association did not empower the board to revoke the appointment at will, or otherwise than in accordance with the terms of the agreement under which he was appointed managing director. In the present case there was not only art. 95 but there was also a specific agreement between Sir Hickman Bacon and the company that the agreement between them for the purchase of the property should be carried out by a company whose Articles of Association included art. 95, and as between Sir Hickman Bacon and the company the company was bound by that article and could not break away from it without Sir Hickman Bacon's assent. If the company is bound by that article it cannot divide its profits until the mortgages are paid off. The contention of the Crown is that a special resolution might have been passed by the company to alter art. 95, but that contention confuses the identity of Sir Hickman Bacon with that of the company contrary to the decision in *Salomon's* case. (2)

This case does not come within s. 21 of the Finance Act, 1922, having regard to the proper interpretation of that section looked at in the light of s. 31 of the Finance Act, 1927. The Act of 1927 was passed to amend the Act of 1922, because the earlier Act was insufficient to meet certain

(1) [1914] 2 K. B. 770. (2) [1897] A. C. 22.

cases, and the Act of 1927 expressly brought into charge sums expended out of the income of the company towards payment for the property which the company was formed to acquire and sums expended in repayment of loan capital or debt, and therefore that Act directly applies to the present case and inferentially shows that the present case was not covered by s. 21 of the Act of 1922, because there would be no reason for expressly so providing in the Act of 1927 if it was the law previously. Lord Sterndale M.R. said in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1): "I think it is clearly established in *Attorney-General* v. *Clarkson* (2) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier." Sargant L.J. also said in *Ormond Investment Co.* v. *Betts* (3): "It seems to me that there is a well recognized principle that where the interpretation of a statute is obscure, ambiguous or readily capable of more than one interpretation, light may be cast on the true view to be taken of that statute by a subsequent statute either reciting the effect of the previous statute, or assuming that the construction is in one definite direction by virtue of the enactments made in the subsequent statute."

In the event of its being held that s. 21, sub-s. 1, of the Finance Act, 1922, upon its true construction, does apply to the present case, then the words "the said income of the company," which for the purposes of assessment to super-tax is to be deemed to be the income of the members, must be construed as meaning "a reasonable part of its actual income from all sources" for the year, and not the total income of the company. The judges of the Scottish Court of Session in *David Carlaw & Sons, Ld.* v. *Inland Revenue Commissioners* (1) expressed sympathy with this contention.

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(1) [1921] 2 K. B. 403, 414.

(2) [1900] 1 Q. B. 156.

(3) [1927] 2 K. B. 326, 350.

*R. P. Hills* (*Sir J. B. Melville S.-G.* with him) for the Crown. This last point is covered by authority. The Court of Session in *David Carlaw & Sons, Ld.* v. *Inland Revenue Commissioners* (1) expressed the view that where there has been retention of undistributed profits with the object of avoidance of super-tax, then the whole income, even including that part which might reasonably have been retained, is to be treated as if it had been distributed. Your Lordship also took the same view recently in *Glazed Kid, Ld.* v. *Inland Revenue Commissioners.* (2) There was no contract between Sir Hickman Bacon and the company that the company should not declare any dividend until the mortgages had been paid off; any right which Sir Hickman Bacon had depended upon art. 95. The company was not precluded from declaring a dividend by its contract with Sir Hickman Bacon for the purchase of the property. There was nothing in the contract to prevent the company from passing a special resolution and amending art. 95 and then declaring a dividend. If the contention put forward on behalf of the company is correct a company could always get out of s. 21 of the Act of 1922 by saying that they could not declare a dividend because the shareholders would not pass a resolution for that purpose: a company cannot say that they are outside the section because they cannot get the shareholders to take the necessary steps for the purpose of declaring a dividend. If a company were able to say that it is a different entity from its shareholders s. 21 would cease to function. For this purpose the shareholders of a company and the company are one entity. Shareholders cannot be treated as a different entity from the company if they refuse to pass the necessary special resolutions. A company does not pass a special resolution but the shareholders of the company, and therefore *Salomon's* case (3) does not apply. Sir Hickman Bacon prevented the company from declaring a

(1) 1926 S. C. 870; 11 Tax Cas. 96.

(2) (1930) Unreported; but see Tax Cases, Leaflet No. 511.

(3) [1897] A. C. 22.

dividend by refusing, in his capacity as shareholder, to pass the special resolution necessary to amend art. 95, but he could not prevent the company from declaring a dividend in his capacity of vendor and mortgagee. The company has not applied the money not paid in dividends in paying off the mortgages but has accumulated a reserve fund for the purpose of rebuilding. A company can accumulate a reserve fund if it likes instead of paying dividends, but if it does it renders itself and its shareholders liable under this section to assessment to super-tax. In *Lionel Sutcliffe, Ld.* v. *Inland Revenue Commissioners* (1) a company which had in a certain year made large profits went into voluntary liquidation at the end of the year and did not pay a dividend at all, and it was held that the company by going into liquidation while the reasonable time contemplated by the Act was still running terminated that reasonable time, and that in view of the intended liquidation it would have been reasonable for them to have distributed the whole of the available income. A company cannot by taking some steps, or by refraining from taking steps necessary to declare a dividend, say that it is thereby outside the Act.

Sect. 21 of the Finance Act, 1922, is framed in wide general terms and covers the present case, and the fact that s. 31 of the Finance Act, 1927, is framed so as to make the point quite clear and beyond the possibility of doubt does not prevent this case also coming within the general terms of s. 21 of the Act of 1922.

*E. G. Palmer* replied.

ROWLATT J. In this case the real point and practically the only point is whether art. 95 of the Articles of Association of this company, and the absence of a special resolution under it, prevents the direction of the Special Commissioners being maintained.

Now in this case there was no contract that the profits of the company should be paid in liquidating the principal of the mortgages. There was, of course, no provision of that sort in the mortgages; there was nothing but the article. The mortgagees were not in possession; they had not appointed a receiver. The position was, so far as mortgagor and mortgagee were concerned, that the mortgages stood as an encumbrance which was going on, interest being paid year by year until such time as the mortgagee wanted the capital paid off, and so far as the mortgagor was concerned, he was liable on his covenants for the principal and for the interest, but the mortgage was an outstanding mortgage, in the way with which we are familiar, possession not having been taken, and no receiver having been appointed. All that was happening was that the interest due under the mortgage had to be paid. That was the position upon the mortgage. But then there was this article: "So long as any mortgage or charge affecting any property of the company shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available, of the principal moneys and the moneys secured by any mortgage or charge for the time being outstanding and unsatisfied, unless the company shall by special resolution direct to the contrary." With reference to that article it is enough to say that that article must be read as a whole, and that the article certainly gives power to the company by special resolution to vacate its veto, even if the veto were a contractual one, which I do not for a moment say it was. In those circumstances, what is the position? I was referred to *Salomon's* case (1) and to other cases with which we are familiar, which emphasize very clearly the difference in personality between a corporation and the corporators, and also affirm very clearly that as a creature of the Articles a shareholder cannot get anything out of a share contrary to the Articles which are its breath and its nature. I do not think any of those cases or any of those principles come into question here at all.

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(1) (1928) 14 Tax Cas. 171.

When one looks at s. 21, sub-s. 1, of the Finance Act, 1922, one sees that the Legislature propounds the question whether a company has distributed a reasonable part of its actual income. There may be formalities in the way of a company doing it; the directors may have to recommend a dividend; certain people may have to concur, for all we know, inside the company. The question is whether the company, looking at it as a whole, has distributed a reasonable part of its income. What does a "reasonable part" of its income mean? It means a reasonable part of its income, having regard to the current requirements of the company's business, and also to such other requirements as may be necessary or advisable for the maintenance and development of that business. When one inquires if a company is distributing a reasonable part of its income, one has to examine what reasons there are for not distributing; some reasons may be good and some bad. A company may show a very large amount of profit, but if there is a contract—as there was in the *Glazed Kid* case (1), which I decided the other day—with some one outside the company under which the company is bound to pay all the profits into a particular banking account, so that if the company did not do that it would be restrained by injunction at once, that is a very excellent reason indeed for not distributing the profits. As I thought and held in that case, it could not be said that a company was not distributing a reasonable part of its income when the company did not distribute that which it could not distribute. On the other hand, there may be reasons for a company not distributing a reasonable part of its income which are not good reasons, such as that the shareholders do not want the profits of the company distributed and insist upon an article being inserted in the Articles of Association of the company which puts it in their power to prevent the profits being distributed by refusing to pass a resolution to the contrary. In my view the company in this case is not distributing a reasonable part of its income; that is how I look at it and there is nothing more in it. The company simply has not distributed a reasonable part of its income. Upon the question whether there should have been a distribution having regard to the reserves required, and the provision for reconstruction, and considerations of that kind, those are considerations which have been dealt with by the tribunals of fact, and they are questions of fact which I do not deal with at all. I think the only question for me is whether this article and the documents precluded the decision to which the tribunals have come.

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(1) [1897] A. C. 22.

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(1) Unreported; but see Tax Cases, Leaflet No. 511.

Another argument was raised by Mr. Palmer based upon s. 31 of the Finance Act of 1927, which enacts that for the purpose of the sub-section with which I am here concerned, "any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business." It then gives certain descriptions of sums which would include the sum in question in this case. Mr. Palmer contends that inasmuch as the Act of 1927 expressly provides that such sums shall be regarded as income available for distribution it shows that such sums were not under the Act of 1922 regarded as income available for distribution. What exactly does that come to? Supposing it was not the law before. It was not, of course, the law before the Act of 1927 was passed in the whole sense of the section, but supposing it was not the law before as regards this particular sum, Mr. Palmer says the law was that this particular sum should not be regarded as available for distribution and should be regarded as having been applied to the current requirements of the company's business. But that is not the result at all. It can be no more than this, that there is no enactment on the subject; it is not the contrary enactment. Apart from that this sub-section merely carries a certain injunction or prohibition as to the way certain things shall be dealt with very far beyond the limits necessary to include this case. It does not in the least follow that this case was not included before the statute of 1927 was passed. When I say included, I mean did not fall to be considered or might not have to be considered in the same way before the statute of 1927 was passed. The statute of 1927 covers this case a fortiori. It does not follow that, apart from that statute altogether, this case was not covered previously on general principles under the Act of 1922. So much for the main part of this case.

Another interesting point has been raised as to the proper construction of the section, whether upon the true construction of the section the Commissioners ought not to have determined what was a reasonable part of the income for the company to distribute. This is not quite a new point, because it arose in Scotland in *Carlaw's* case (1), and it also arose before me the other day in the *Glazed Kid* case. (2) The Scottish Courts, and I also, proceeded upon the footing that when there had not been a distribution of a reasonable part of the actual income of the company, the whole of the income—not merely the part that might reasonably have been distributed—was to be treated as covered by the direction of the Commissioners under the section. The way the point arose in Scotland is very curious, because the subject never argued to the contrary, but just the reverse. He came and propounded that result of the section, and said: "See the penal character of that." From that he argued that the section ought not to apply unless there was mens rea on the part of the subject in the case. It was never argued to the contrary in that case, and it was not argued before me in the *Glazed Kid* case (2), so perhaps really I am not bound by that case as a matter of authority. But I am quite clear myself, if it is open to me to express an opinion now, that the construction of s. 21, sub-s. 1, of the Act of 1922 which is contended for by the Crown is right. It says that "the Commissioners may, by notice in writing to the company, direct that for purpose of assessment to super-tax, the said income of the company shall . . . . be deemed to be the income of the members." What is the "said income"? The earlier part of the section provides that "Where it appears to the Special Commissioners

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(1) 1926 S. C. 870; 11 Tax Cas. 96.

(2) Unreported; but see Tax Cases, Leaflet No. 511.

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that any company . . . . has not, within a reasonable time after the end of any year . . . . distributed to its members . . . . a reasonable part of its actual income from all sources" the Commissioners may direct, etc. The words "said income" refer, I think, to "actual income" and not to "a reasonable part of its actual income," because it is to be observed that the Commissioners are never asked or required to say what is a "reasonable part," and "said income" has nothing to refer to it, because it is an entirely different thing to ask a person to say that so much is not a reasonable part from asking him to say what is a reasonable part; one does not involve the other. They are not asked to say what a reasonable part is. They are asked whether what has been distributed is not a reasonable part, and it is an entirely different question. It is the only thing they are asked to do, and there is no inquiry which they are required to make as a result of which "said income" can refer, as I understand it. It has been said that this is very penal, and that that is not the construction of the section which ought to be adopted. There are two sides to that question. The scheme of this sub-section is that companies are divided into two classes: those companies which distribute a reasonable part of their income and those who do not. If a company does not distribute a reasonable part of its income then it falls to be dealt with as if it were a partnership, and as if the income were the income of the individual partners, but otherwise it goes on as a company. That is a very clear way of doing it. If it had been that in every case the Commissioners were to find out what was a reasonable dividend to declare and insist upon super-tax being paid upon that footing I can very well conceive that their activities might be very largely employed, because in practice it would come to this, that the dividends of private companies would be taxed up in almost all cases, and the subject would have very great ground for complaint. It is only fair to say it is not at all improbable that this is in the long run a more beneficial way of dealing with the question from the point of view of the subject, especially for a subject who does not want to

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take an unfair advantage of the Revenue. It is only fair to say that, because the judges in the Court of Session had intellectual sympathy if they had not moral sympathy with the contention put forward on behalf of the subject, and I think there are two sides to the question. I think the appeal fails on both points, and therefore must be dismissed.

*Appeal dismissed.*

Solicitors for the company: *Oldman, Cornwall & Wood Roberts.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1930.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1930, will be as follows :—

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